No. 990

Office Supreme Court, U.S.
FILED
MAY 9 1958
JOHN T. FEY, Clerk

No. 25,

May Term, 1958.

IN THE

# Supreme Court of Pennsylvania

MIDDLE DISTRICT.

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COMMONWEALTH OF PENNSYLVANIA

*vs.*

NATIONAL BISCUIT COMPANY,

*Appellant.*

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# RECORD.

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**Appeal From Final Judgment of the Court of Common Pleas of Dauphin County at No. 59 Commonwealth Docket, 1954.**

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ROY J. KEEFER,
HULL, LEIBY & METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania,

LESLIE M. SWOPE,
DRINKER BIDDLE & REATH,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania,
*Counsel for Appellant.*

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# Record.

## I.

## RELEVANT DOCKET ENTRIES.

Appeal from decision of Board of Finance & Revenue, Franchise Tax for 1952.

Apr. 14, 1954. Appeal & objections filed.

May 18, 1954. Approved bond filed.

Oct. 11, 1955. Stipulation of facts filed.

Oct. 11, 1955. Agreement to try without a jury filed.

Nov. 2, 1955. Record of hearing of Oct. 11, 1955 lodged.

Nov. 18, 1955. Record of hearing of Oct. 11, 1955 filed.

Jan'y 25, 1956. Amendments to stipulation of facts filed.

Jan'y 25, 1956. Briefs of Comth & Appellant filed. Case argued before Court en banc. Deft's requests for Findings of Fact & Conclusions of law filed.

Febry 9, 1956. Deft's Reply Brief filed.

Feby 15, 1956. Record to Court.

Feby 24, 1956. Comth's requests for Findings of Fact & Conclusions of law filed.

Feby 24, 1956. Comth's reply brief filed.

April 12, 1956. Appeal is dismissed and judgment entered in favor of Commonwealth and against Deft for $58,321.60 and marked satisfied unless exceptions be filed within 30 days, see opinion and order filed.

April 27, 1956. Deft's Exceptions filed s/a.

Oct. 3, 1956. Deft's brief filed.

Oct. 11, 1956. Plffs brief filed. Case argued before Court en banc. Record to Court.

Nov. 9, 1956. Judgment entered in accordance with decree nisi, see opinion & final Order filed.

Nov. 29, 1956. Certiorari sur appeal from Supreme Court to No. 25 May T. 1957, filed.

Nov. 29, 1956. Notice of appeal & acceptance of service by Court below filed, also by Appellee.

## II.

## APPEAL AND SPECIFICATION OF OBJECTIONS.

National Biscuit Company, hereinafter referred to as appellant, hereby appeals from the settlement of Franchise Tax made against it for the year 1952 and from the refusal of its Petition for Review of said settlement by the Board of Finance and Revenue and in support of its appeal avers:

1. Appellant was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business in Pennsylvania on March 28, 1899, and re-registered on August 21, 1933, under the Business Corporation Law of 1933 to engage in Pennsylvania in the business of "manufacture and sale of bakery products".

2. Appellant's principal address is 449 West Fourteenth Street, New York, N. Y.; and its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

3. The tax involved is the so-called "Franchise Tax" imposed under the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420 as amended by the Act of May 16, 1935, P. L. 184 and by further amendatory Acts; 72 Purdon's Statutes 1871, 1901. The said Act of 1889 and amendatory Acts will sometimes be referred to herein as the Act of May 16, 1935, P. L. 184, as amended.

4. During the year 1952, appellant was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and, also, it was engaged exclusively outside of Pennsylvania in the ownership, control and supervision of its intangible assets which

included, inter alia, investments in United States securities and shares of stock of subsidiary companies operating in foreign countries. The business of the subsidiary companies was independent of and unrelated to the business conducted by appellant in the United States, including Pennsylvania.

5. Using a report blank furnished to it by the Department of Revenue, appellant duly filed with that department its "Franchise Tax" report for 1952, which is incorporated herein by reference. As indicated in this report, appellant had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President and Treasurer were located and performed their duties at 449 West Fourteenth Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey City, New Jersey; and its directors met, its principal bank account was maintained and its bonds, securities, etc., were kept, in New York City.

6. Also, as indicated in part in said Report, the assets of the appellant included, inter alia, the following at December 31, 1952:

| | |
|---|---|
| Investment in United States securities | $26,300,000.00 |
| Investment in shares of subsidiary companies operating in foreign countries | 8,823,465.17 |
| Investment in tangible property in Pennsylvania | 6,333,877.00 |

7. On the basis of said Report and pursuant to the purported provisions of the Act of May 16, 1935, P. L. 184, as amended, the Department of Revenue, on October 28, 1953, settled, and, on November 5, 1953, the Department of the Auditor General approved settle-

ment of a so-called "Franchise Tax" against appellant for the year 1952. Said Settlement was made upon the theory that the tax is an Excise Tax and not a Property Tax. A true and correct copy of said Settlement, mailed to appellant on November 16, 1953, is attached hereto, made a part hereof, and marked Exhibit "A".

8. In the said "Franchise Tax" settlement, the taxable valuation to which the tax rate is applied is determined to be $11,664,320. On a property tax basis, to wit, the ratio of tangible property in Pennsylvania to total assets times the Capital Stock valuation of $160,000,000

$$\left(\frac{6,333,877}{194,941,349} \times 160,000,000 = 5,198,591\right),$$

the taxable valuation is $5,198,591. The excess of the taxable valuation on the "Franchise Tax" basis over the taxable valuation on the property tax basis, or $6,465,729, represents the taxable value attributable to appellant's tangible and intangible assets which had their situs, domiciliary, business or commercial, outside of Pennsylvania, including large investments in United States securities and shares of subsidiary companies operating in foreign countries, as listed heretofore.

9. On June 26, 1953, the Supreme Court of Pennsylvania, in the case of *National Biscuit Company v. Philadelphia,* 374 Pa. 604, held that the so-called Pennsylvania "Franchise Tax" is a property tax and not an excise tax. That case arose upon a Bill in Equity filed by appellant and is the last expression of opinion by said Court as to the nature of the tax in its application to appellant. For purposes of this appeal, it must be accepted as expounding the controlling judicial interpretation of appellant's rights and liabilities. This is particularly true since the prior decisions of the

Supreme Court of Pennsylvania were inconsistent in expounding the nature of the same tax as follows (list of cases is not exclusive):

| *Year of Decision* | *Case.* | *Nature of Tax* |
|---|---|---|
| 1939 | *Com. v. Columbia Gas & Electric Corporation,* 336 Pa. 209 | Excise Tax |
| 1944 | Com. v. Ford Motor Company, 350 Pa. 236 | Excise Tax |
| 1944 | Com. v. Quaker Oats Company, 350 Pa. 253 | Excise Tax |
| 1945 | Com. v. Monessen Amusement Company, 352 Pa. 120 | Excise Tax |
| 1948 | Federal Drug Co. v. Pittsburgh, 358 Pa. 454 | Property Tax |
| 1950 | Murray v. Philadelphia, 364 Pa. 157 | Property Tax |
| | to which list there is now added, as above described: | |
| 1953 | *National Biscuit Company v. Phila. supra* | Property Tax |

10. On January 26, 1954, appellant filed with the Department of Revenue its Petition for Resettlement of the "Franchise Tax" settled against it for the year 1952. In that Petition appellant contended that the settlement should have been made on a property tax basis in accordance with the decision of the Supreme Court of Pennsylvania in the *National Biscuit Case,* and set forth all of the questions raised and objections specified herein.

11. On February 11, 1954, the Department of Revenue and Auditor General refused the prayer of said petition for resettlement. A true and correct copy of the notice of refusal, mailed to appellant under

date of February 17, 1954, is attached hereto, made a part hereof, and marked Exhibit "B".

12. On March 11, 1954, appellant filed with the Board of Finance and Revenue its Petition for Review of the action of the Departments of Revenue and Auditor General in refusing its petition for resettlement. In that Petition for Review, appellant repeated its contention that the settlement should have been made on a property tax basis in accordance with the decision of the Supreme Court of Pennsylvania in the *National Biscuit Case,* and set forth all the questions raised and objections specified herein.

13. On March 17, 1954, the Board of Finance and Revenue refused the prayer of its Petition for Review. A true and correct copy of the notice of refusal is attached hereto, made a part hereof, and marked Exhibit "C".

14. In accordance with the provisions of the Acts of Assembly in such case made and provided the appellant, National Biscuit Company, being aggrieved by the settlement and by the decision of the Board of Finance and Revenue, prosecutes this appeal therefrom and files herewith the following:

SPECIFICATION OF OBJECTIONS:

(1) The tax settlement against appellant for 1952, having been made upon the theory that the tax is an excise tax and not a property tax, is contrary to the decision of the Supreme Court of Pennsylvania in *National Biscuit Company v. Philadelphia,* 374 Pennsylvania 604 (1953), and other decisions of that Court holding the tax to be a property tax.

(2) The tax imposed under the provisions of the Act of May 16, 1935, P. L. 184, as amended, having

been held to be a property tax as aforesaid, the so-called "Franchise Tax" settlement made against your appellant for 1952 pursuant thereto and the refusal of its Petition for Review by the Board of Finance and Revenue violate:

(a) Article VI, Clause 2, and Article I, Section 8, Clause 2 of the Constitution of the United States in that the tax is imposed in part upon appellant's investment in United States securities.

(b) Section 3701 of the Revised Statutes of the United States, 31 U. S. C. Section 742, which generally exempts interest-bearing obligations of the United States from State and local taxation.

(c) The due process and property clauses, Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that tax is imposed upon tangible and intangible assets of appellant which have their situs outside of Pennsylvania, and which therefore are beyond the taxing power and jurisdiction of Pennsylvania.

(d) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions, particularly of U. S. securities and tangible property located outside of Pennsylvania, granted to domestic corporations, are denied to your appellant, a foreign corporation.

(3) Under the Constitutions both of the United States and of Pennsylvania, appellant has the right to be heard in the courts and to have its tax liability determined according to law and justice. If, in the proceedings instituted by this appeal, the so-called

"Franchise Tax" settlement made against appellant for the year 1952 should be upheld by the courts of the Commonwealth of Pennsylvania, such decision would be inconsistent with the above mentioned prior decision rendered against appellant in the *National Biscuit Case supra*, would subject appellant to simultaneous double taxation under two mutually exclusive taxing statutes, and would be arbitrary and unreasonable. Inasmuch as the several decisons of the Supreme Court of Pennsylvania have been based upon inconsistent theories as to the nature of the tax; if the decision of the Supreme Court in the *National Biscuit Case supra* should not be followed in this proceeding, representing another reversal of theory as to the nature of the tax, appellant avers that it will have been denied a fair trial in the courts and a reasonable adjudication of its rights. In such event and under such circumstances, the Pennsylvania and Federal Constitutions would be violated as follows:

(a) The due process clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States; in that such decision would be inconsistent with the above mentioned prior decison rendered against appellant, would subject appellant to two mutually exclusive taxing statutes, would be arbitrary and unreasonable, and would deny appellant a fair trial in the courts and a reasonable adjudication of its rights.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions granted to domestic corporations would be denied to your appellant, a

foreign corporation, on the basis of semantics and of distinctions having no substance or reality.

(c) Section 1 of Article III of the Constitution of the Commonwealth of Pennsylvania, in that such inconsistent decisions would usurp the legislative power and would constitute legislation by the Pennsylvania courts.

(d) Section 3 of Article III of the Constitution of the Commonwealth of Pennsylvania, in that the subject of the Act, as construed inconsistently by the courts from time to time, is not expressed clearly in its title.

(e) Sections 11 and 12 of Article I of the Constitution of Pennsylvania, in that appellant would be denied its day in court, a remedy by due course of law, and right and justice administered to it without sale, denial or delay; and the power of suspending laws would be exercised by the courts without authority of the legislature.

(f) Section 2, Clause 1 of Article IV of the Constitution of the United States, in that appellant, a foreign corporation, would be denied privileges and immunities of citizens of Pennsylvania.

(g) Clause 2 of Article VI of the Constitution of the United States, in that the judges in Pennsylvania upholding the settlement would be acting inconsistently with the constitutional mandate that the constitution and laws of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby.

(4) The Board of Finance and Revenue erred in making the following decision:

"This Petition for Review is refused and the action taken by the Department of Revenue, approved

by the Department of the Auditor General, is hereby sustained".

(5) The Board of Finance and Revenue erred in refusing to resettle the tax in an amount not exceeding $25,992.95.

(6) General relief.

WHEREFORE, appellant prays that this Honorable Court shall hear its Appeal and that the proper adjustment, order or decree be entered in favor of appellant correcting said settlement of "Franchise Tax" against Appellant for the year 1952 by eliminating therefrom any tax or portion thereof imposed upon or with respect to appellant's investments in United States securities and its tangible assets and/or its other assets having a situs outside of Pennsylvania, or for such other relief as may be proper under the circumstances of this case; and that a credit be allowed for the overpayment of "Franchise Tax" by appellant.

And it will ever pray, etc.

NATIONAL BISCUIT COMPANY,

By /s/ G. A. MITCHELL,
*Vice-President.*

(Corporate Seal)

Attest:

/s/ A. T. BULLOCK, *Secretary.*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

G. A. MITCHELL, being duly sworn according to law, deposes and says that he is Vice-President of NATIONAL BISCUIT COMPANY, the appellant in the foregoing Appeal to the Court of Common Pleas of Dauphin County from the settlement of "Franchise Tax" made against it for the year 1952, and from the refusal of its Petition for Review by the Board of Finance and Revenue; that this Appeal is not taken for delay, but because appellant believes injustice has been done by the settlement of the account and the decision of the Board of Finance and Revenue appealed from; and that the facts set forth in the said Appeal and in the accompanying Specifications of Objections, incorporated herein, and in the exhibits attached thereto, are true to the best of his knowledge and belief.

/s/ G. A. MITCHELL

Sworn to and subscribed before me this 12th day of April, 1954.

/s/ WILLIAM H. PETERSON
*Notary Public, State of New York*
No. 31-8344000
Qualified in New York County
My Commission Expires: March 30-1956

(Seal)

ROY J. KEEFER,
HULL, LEIBY AND METZGER,
208 Walnut Street,
Harrisburg, Pennsylvania.
LESLIE M. SWOPE,
CHARLES J. BIDDLE,
DRINKER, BIDDLE & REATH,
117 South 17th Street,
Philadelphia 3, Pennsylvania,
*Attorneys for National Biscuit Company.*

**Exhibit "A".**

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**FRANCHISE TAX SETTLEMENT**

**(Certified Copy)**

Commonwealth of Pennsylvania

Department of Revenue

Harrisburg, Penna.

Date Mailed. Nov. 16, 1953

Box No. 2295-07

Invoice No. .....

Return this sheet with remittance drawn to the order of Commonwealth of Pennsylvania.

Checks are received subject to final payment and at the risk of the taxpayer.

(20)

Note: Balance due on this account bears interest at 6% from the due dates to date of payment, as provided in section 806 of the fiscal code, as amended 1945.

National Biscuit Company

c/o Hull, Leiby & Metzger
Harrisburg, Pennsylvania

In account with the Commonwealth of Pennsylvania

SETTLEMENT—FRANCHISE TAX

For Twelve Months Ending 12/31/52

Value of Capital Stock as Appraised by Department of Revenue .....$160 000 000

$ 6 670 235
———————— = .050988 $
$130 818 469

$ 10 531 322
———————— = .097687
$107 806 607

$ 25 527 941
———————— = .070032 .072902
$364 516 055 3).218707

Taxable Value .....$ 11,664,320

| | |
|---|---|
| Tax at Five Mills ..... | $58,321.60 |
| Penalty (For failure to file reports within time limit prescribed by law) ..... | |
| Total ..... | $58,321.60 |
| Do not include interest. Interest statement will follow payment of tax balance | |
| Amount Paid ..... | 58,308.88 |
| Balance due Commonwealth . | $ 12.72 |

(Seal)

DEPARTMENT OF REVENUE

Harrisburg, Pa., 10-28-53

settled and delivered to auditor general:

S. C. AUDELEWICZ,
Secretary of Revenue

For OTTO F. MESSNER

DEPARTMENT OF THE AUDITOR GENERAL

Harrisburg, Pa., 11-5-53

audited and approved:

JOHN L. BRINTON
For CHAS. R. BARBER
Auditor General

---

**Exhibit "B"—Refusal of Petition for Resettlement.**

**Printed as Commonwealth's Exhibit No. 3 at Page 38a, infra.**

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**Exhibit "C"—Refusal of Petition for Review.**

**Printed as Commonwealth's Exhibit No. 5 at Page 43a, infra.**

## III.

## EVIDENCE—TRANSCRIPT OF PROCEEDINGS.

Before: Honorable WILLIAM H. NEELY, *Judge*, Honorable WALTER R. SOHN, *Judge*, Honorable HOMER L. KREIDER *Judge*, and Honorable KARL E. RICHARDS, *Judge*, 12th Judicial District of Pennsylvania, Courts of Dauphin County.

At Harrisburg, Pennsylvania, Tuesday, October 11, 1955, beginning at 11:00 o'clock a. m., E. D. S. T., in Court Room No. 1, Dauphin County Court House.

Appearances:

For the Commonwealth: GEORGE W. KEITEL, ESQ., Deputy Attorney General.

For the Defendant: HULL, LEIBY & METZGER, by ROY J. KEEFER, ESQ; DRINKER, BIDDLE & REATH, by LESLIE M. SWOPE, ESQ.

Mr. Keitel: Commonwealth versus National Biscuit Company. This case involves a 1952 franchise tax with the National Biscuit Company, and to put the issue broadly, raises a question of whether this is a property tax or an excise tax. I won't attempt to argue the various issues involved here, but merely state that is essentially the general question involved developed by counsel.

Mr. Keefer: May it please the Court, Charles J. Biddle and Leslie M. Swope of the Philadelphia law firm of Drinker, Biddle and Reath are associated with my firm as counsel for the defendant in this case. Mr. Swope is present here this morning. I don't think he needs any introduction to the Court.

The Court: (Judge Neely): Very happy to have you with us.

Mr. Keefer: I wanted to make a supplemental statement as to the issues involved in the case, if I may, because I am going to come along later and we may have the same problem that you have in the Circular Realty case where you had incorporation by reference.

This case arises in this way. The Sterling Act of 1932 authorized the City of Philadelphia to levy taxes. It contained provisions prohibiting the City of Philadelphia from duplicating any State tax or license fee. Under an ordinance of December of 1952 Philadelphia levied a mercantile license tax measured by the annual volume of business, or at the option of the business by annual volume of business less labor and material costs.

National Biscuit Company, the present defendant in this proceeding, and other taxpayers, protested the Philadelphia tax on the ground that the Philadelphia tax, being a tax on the privilege of engaging in business, duplicated the State Franchise and Corporate Net Income Taxes.

The Court (Judge Neely): Was that tax levied under the tax anything act?

Mr. Keefer: No, the Sterling Tax Act of 1932 was the forerunner of the tax anything act in 1947. In every court decision involving the State Franchise and Corporate Net Income Taxes directly, the courts have held that those taxes were privilege taxes. Therefore, the National Biscuit Company and other taxpayers in the Philadelphia case contended that the Philadelphia tax duplicated the State tax.

The Supreme Court of Pennsylvania, a majority, upheld the Philadelphia tax on the ground that the Philadelphia tax levied an excise tax on a privilege of doing business, whereas the State taxes were property taxes.

Now, National Biscuit Company, the present defendant in this proceeding, contends that if the Franchise Tax is a Property Tax, Property Tax principles ought to be applied. Accordingly and of necessity, one of the main issues is as to the nature of the tax. And if it is a Property Tax, then constitutional questions arise as to the taxation of United States securities and assets beyond the jurisdiction of Pennsylvania.

Would you want to add anything, Mr. Swope?

Mr. Swope: No.

---

JOHN D. RIVELY: Called as a witness on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Keitel:

Q. Mr. Rively, state your position with the Department of Revenue?

A. Principal Tax Examiner, Bureau of Corporation Taxes.

Q. As such are you familiar with the tax files of the Department of Revenue?

A. Yes, sir.

(Commonwealth's Exhibit No. 1, being franchise tax report for year 1952, was produced and marked for identification.)

Q. I refer you to Commonwealth's Exhibit No. 1 and ask you to identify that?

A. This is the 1952 franchise tax report as filed by the National Biscuit Company.

Q. Does that report contain a settlement of the tax?

A. Yes, sir.

Q. What is the date and amount of that settlement?

A. The report was settled on November 5th, 1953. It shows a settlement in the amount of $58,321.60.

(Commonwealth's Exhibit No. 2, being petition for resettlement, was produced and marked for identification.)

Q. I refer you now to Commonwealth's Exhibit No. 2 and ask you to identify that?

A. This is a petition for resettlement of the franchise tax imposed against the National Biscuit Company for the calendar year 1952.

(Commonwealth's Exhibit No. 3, being order refusing resettlement, was produced and marked for identification.)

Q. I refer you now to Commonwealth's Exhibit No. 3 and ask that you identify that?

A. This is a decision made by the Resettlement Board of the Department of Revenue stating that the petition for resettlement has been refused.

(Commonwealth's Exhibit No. 4, being petition for review, was produced and marked for identification.)

Q. Referring now to Commonwealth's Exhibit No. 4, will you identify that?

A. This is a petition for review of franchise tax imposed against the National Biscuit Company for the calendar year 1952 as filed with the Board of Finance and Revenue of the Department of Revenue.

(Commonwealth's Exhibit No. 5, being order refusing petition for review, was produced and marked for identification.)

Q. Referring now to Commonwealth's Exhibit No. 5, will you identify that?

A. This is a decision reached by the Board of Finance and Revenue stating that the petition for review as filed by the National Biscuit Company for the franchise tax imposed for the calendar year 1952 has been refused and the decision of the Department of Revenue and the Auditor General is confirmed.

(Commonwealth's Exhibit No. 6, being transcript of the ledger account, was produced and marked for identification.)

Q. Mr. Rively, I refer you to Commonwealth's Exhibit No. 6 and ask that you identify that?

A. This is a transcript of the ledger record in the Department of Revenue showing that the franchise tax for the National Biscuit Company for the year 1953 has been paid in full.

Mr. Keitel: May it please the Court, we offer into evidence Commonwealth's Exhibits 1 to 6 inclusive.

The Court (Judge Neely): Any objection?

Mr. Keefer: No objection.

The Court (Judge Neely): They may be admitted.

(Commonwealth's Exhibit No. 7, being Stipulation of Facts and Commonwealth's Exhibit No. 8, being agreement to try without jury, were produced and marked for identification.)

Mr. Keitel: The Commonwealth would also like to offer into evidence Stipulation of Facts which has been agreed to by counsel for the respective parties; and also stipulation for the trial of this case without a jury.

The Court (Judge Neely): No objection?

(No audible response.)

The Court (Judge Neely): Admitted.

Mr. Keitel: The Commonwealth rests.

The Court (Judge Neely): The defendant?

Mr. Keefer: May it please the Court, I would just like to state that the Stipulation of Fact has been offered in evidence on behalf of the defendant also.

I have no questions to ask the witness.

In Paragraph 19 of the Stipulation, the parties have agreed that the entire record in the Philadelphia Mercantile License Tax case shall be incorporated in this proceeding by reference as evidence of the facts and issues involved in that case.

The Court (Judge Neely): The record in the Supreme Court?

Mr. Keefer: Yes. The record and the briefs of the parties and the Philadelphia Ordinance. We didn't want to put these in the record because if and when the case goes up on appeal we didn't want to have to print these and be a part of the record costs. But I wanted to offer them now for the convenience of the Court merely. These documents consist of the record, the supplemental record, the Philadelphia Ordinance, and the briefs of both parties.

If it will help the Court, we will offer them into the record.

(Whereupon, discussion off the record.)

The Court (Judge Neely): The defendant is offering this record, we understand?

Mr. Keefer: That's right.

The Court (Judge Neely): Will you have it identified as an exhibit?

Mr. Swope: We will have to identify each of these papers.

The Court (Judge Neely): Can you have the whole record identified as an exhibit?

Mr. Keefer: As just one exhibit?

The Court (Judge Neely): As one exhibit. The record you are offering, can't it be identified as an exhibit?

Mr. Swope: That is all right.

The Court (Judge Neely): It can all be put in a big envelope and kept as an exhibit.

Mr. Swope: We have everything here except the Sterling Act.

The Court (Judge Neely): The one you have here is the one we will admit.

Mr. Swope: That's right.

The Court (Judge Neely): You have it identified as an exhibit please.

(Defendant's Exhibit No. 1, consisting of record, briefs and Philadelphia Ordinance, were produced and marked for identification.)

Mr. Keefer: We offer in evidence on behalf of the defendant and ask it be identified as Defendant's Exhibit No. 1 various documents involved in the case of National Biscuit Company versus Philadelphia, 374 Pennsylvania 604, which are as follows:

The Court (Judge Neely): Are they set forth in the stipulation?

Mr. Keefer: Yes, they are.

The Court (Judge Neely): Are as set forth in the stipulation.

Mr. Keefer: Which are as set forth in Paragraph 19 of the Stipulation of Facts.

The Court (Judge Neely): Defendant's Exhibit No. 1 is admitted in evidence in accordance with the stipulation of the parties. It need not be transcribed as part of the record in this proceeding.

Mr. Keitel: We, of course, wish to reiterate our objection as to the relevancy of this exhibit.

The Court (Judge Neely): You are objecting to its relevancy, but you have stipulated it may be admitted.

Mr. Keitel: Subject to our objection as to relevancy, may it please the Court, and that is true as to everything in the stipulation. Both parties have reserved that point.

(Whereupon, discussion off the record.)

Mr. Keefer: There is one other matter that I would like to refer to in the Stipulation of Facts. Mr. Keitel, Deputy Attorney General, agreed this morning that there may be added a clause at the end of the second paragraph in Paragraph 19 of the Stipulation of Facts, the clause being, and this is the part to be added:

"And of the capital stock tax previously imposed on foreign corporations."

Mr. Keitel agrees to that, so the Court will admit that.

The Court (Judge Neely): You agree, Mr. Keitel?

Mr. Keitel: Yes, we agree, subject, of course, to the same objection as to relevancy.

The Court (Judge Neely): Admitted.

(Defendant's Exhibit No. 2, being appeal and specification of objections, and Defendant's Exhibit No. 3, being the appeal bond, were produced and marked for identification.)

Mr. Keefer: We would like to offer in evidence on behalf of the defendant Defendant's Exhibit No. 2, being the appeal and specification of objections, and Defendant's Exhibit No. 3, being the appeal bond.

The Court (Judge Neely): Any objection?

Mr. Keitel: No objection.

The Court (Judge Neely): Admitted.

Mr. Keefer: Defendant rests.

(Whereupon, at 11:30 o'clock a.m., trial concluded.)

## COMMONWEALTH'S EXHIBIT NO. 1

**1952 Franchise Tax Report and Franchise Tax Settlement Thereon.**

(Report not printed, copies to be handed up to court. Settlement printed at pages 13a-14a, *Supra.*)

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## COMMONWEALTH'S EXHIBIT NO. 2.

**Petition for Resettlement.**

IN THE DEPARTMENT OF REVENUE
OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR RESETTLEMENT OF FRANCHISE TAX IMPOSED AGAINST NATIONAL BISCUIT COMPANY FOR THE CALENDAR YEAR 1952

To the HONORABLE OTTO F. MESSNER, Secretary of Revenue, and the HONORABLE CHARLES R. BARBER, Auditor General.

Sirs:

The Petition of National Biscuit Company, hereinafter referred to as Petitioner, for resettlement of Franchise Tax imposed against it for the year 1952 respectfully represents:

A. FORMAL AVERMENTS.

a. The name of the Corporation is National Biscuit Company. Its principal address is 449 West 14th Street, New York, New York. Its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

b. The box number appearing on the certified copy of the settlement is 2295-07.

c. The year involved is 1952. The amount of tax assessed was $58,321.60. The amount of tax petitioner claims is correct is not over $25,992.95.

d. The tax involved is the so-called "Franchise Tax" imposed by the Act of May 16, 1935, P. L. 184 as amended (which amended sections 20 and 21 of the Act of June 1, 1889, P. L. 420 as amended), 72 Purdon's Statutes, 1871.

B. Items to Which Petitioner Takes Exception.

Petitioner takes exception to the computation of the tax under the formula as provided in said Act of 1935 as amended, which necessarily imposes the tax upon its investments in United States Securities, and upon its tangible and intangible property having a situs outside of Pennsylvania. Petitioner contends that its tax should be settled in accordance with the following formula, to wit, the ratio of tangible property in Pennsylvania to total assets times the Capital Stock valuation times the tax rate of five mills:

$$\frac{6,333,877}{194,941,349} \times 160,000,000 \times 5 \text{ mills}$$

C. Summary Statement of the Reasons Upon Which the Taxpayer Relies.

*Facts.*

Petitioner was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business in Pennsylvania on March 28, 1899, and reregistered on August 21, 1933 under the Business Corporation Law of 1933 to engage

in Pennsylvania in the business of "manufacture and sale of bakery products".

During the year 1952, Petitioner was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and, also, it was engaged exclusively outside of Pennsylvania in the ownership, control and supervision of its intangible assets which included United States securities and shares of stock of subsidiary companies operating in foreign countries. The business of the subsidiary companies was independent of and unrelated to the business conducted by Petitioner in the United States, including Pennsylvania.

Using a report blank furnished to it by the Department of Revenue, Petitioner duly filed with that Department its "Franchise Tax" Report for 1952, which is incorporated herein by reference, along with the facts and figures therein set forth. As indicated on this Report, Petitioner in 1952 had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President and Treasurer were located and performed their duties at 449 West 14th Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey City, New Jersey; and its directors met, its principal bank account was maintained and its bonds and securities, etc., were kept, in New York City.

Also, as indicated in part on that Report, the assets of the Company included, inter alia, the following, at December 31, 1952:

| | |
|---|---|
| Investment in United States Securities | $26,300,000.00 |
| Investment in shares of subsidiary companies operating in foreign countries | 8,823,465.17 |
| Tangible property in Pennsylvania | 6,333,877.00 |

On the basis of the above mentioned report and pursuant to the purported provisions of the Act of May 16, 1935, P. 6, 184, as amended, the Department of Revenue, on October 28, 1953, settled and, on November 5, 1953, the Department of the Auditor General approved settlement of "Franchise Tax" against petitioner for the year 1952. A true and correct copy of said settlement mailed to Petitioner on November 16, 1953, is attached hereto, made a part hereof, and marked Exhibit "A".

Said tax was paid as follows:

| | |
|---|---|
| March 5, 1953 | $58,308.88 |
| March 7, 1952 (transfer of credit) | 12.72 |
| Total | $58,321.60 |

In the said "Franchise Tax" settlement, the taxable valuation to which the tax rate is applied is determined to be $11,664,320. On a property tax basis, to wit, the ratio of tangible property in Pennsylvania to total assets times the Capital Stock valuation of $160,000,000

$$\left(\frac{6,333,877}{194,941,349} \times 160,000,000 = 5,198,591\right),$$

the taxable valuation is $5,198,591. The excess of the taxable valuation on the "Franchise Tax" basis over the taxable valuation on the property tax basis, or $6,465,729, represents the taxable value attributable to Petitioner's tangible and intangible assets which have their situs, domiciliary, business or commercial, outside of Pennsylvania, including large investments in U. S. Securities and subsidiaries in foreign countries above mentioned.

*Discussion.*

On June 26, 1953, the Supreme Court of Pennsylvania held that the so-called Pennsylvania "Franchise Tax" is a *property tax,* and not an excise tax. *National Biscuit Company v. Philadelphia,* 374 Pa. 604. This case arose upon a Bill in Equity filed by your Petitioner and is the last expression of opinion by said Court as to the nature of the tax. For purposes of this petition, it must be accepted as expounding the controlling judicial interpretation of the law.

This is practically true, since the prior decisions of that Court were repeatedly inconsistent in expounding the nature of the *same tax* as follows:

| *Year of Decision* | *Case* | *Nature of Tax* |
|---|---|---|
| 1938 | *Blauner's Inc. v. Philadelphia* 330 Pa. 342 | Property Tax |
| 1939 | *Com. v. Columbia Gas & Electric Corporation,* 336 Pa. 209 | Excise Tax |
| 1940 | *Philadelphia v. Samuels,* 338 Pa. 321 | Property Tax |
| 1945 | *Com. v. Ford Motor Company,* 350 Pa. 236 | Excise Tax |
| 1945 | *Com. v. Quaker Oats Company,* 350 Pa. 253 | Excise Tax |
| 1945 | *Com. v. Monessen Amusement Company,* 352 Pa. 120 | Excise Tax |
| 1948 | *Federal Drug Co. v. Pittsburgh,* 358 Pa. 454 | Property Tax |
| 1950 | *Murray v. Philadelphia,* 364 Pa. 157 | Property Tax |
| | to which list there is now added, as above described: | |
| 1953 | *National Biscuit Company v. Phila., supra* | Property Tax |

If, as the Pennsylvania Supreme Court has now finally decided, the so-called Pennsylvania "Franchise Tax" is a property tax, and not an excise tax, United States securities may not be subjected to the tax. Thus in *Com. v. Curtis Publishing Co.*, 363 Pa. 299, 312 (1949), the Pennsylvania Supreme Court said:

> "If the Pennsylvania Corporate Net Income Tax is to be deemed a property tax, the inclusion of interest on United States securities in the tax base constitutes a direct tax upon such interest which is unconstitutional under the foregoing authorities."

The Court quoted (p. 311) from *Missouri etc. v. Gehner et al.* 281 U. S. 313, as follows:

> "It is elementary that the bonds or other securities of the United States may not be taxed by state authority."

Moreover, insofar as the present tax amounts to a property tax upon United States securities, it is invalid as in conflict with Section 3701 of the Revised Statutes of the United States, which provides that "all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals of New Jersey et al.*, 338 U. S. 665.

Furthermore, Pennsylvania cannot impose a property tax upon extraterritorial assets of a foreign corporation because it has no jurisdiction to tax such assets. In the case of *Com. v. Curtis Publishing Co.*, 237 Pa. 333 (1912), the Supreme Court of Pennsylvania held that the situs of the intangible assets of a foreign corporation doing business in Pennsylvania,

in the absence of any statutory provision to the contrary, was the domicile of such foreign corporation and, therefore, such intangible assets were not subject to property tax in Pennsylvania.

Furthermore, if the so-called "Franchise Tax" is a property tax it cannot be imposed upon such assets, because the exemption of United States securities and tangible property located outside of Pennsylvania, allowed under the Pennsylvania Capital Stock Tax, would cause it to violate the Uniformity Clause of the Pennsylvania Constitution, as the Supreme Court admitted in *Commonwealth v. Ford Motor Company, supra,* at 350 Pa. 250, where it said:

> "The alleged discrimination in our tax laws against foreign corporations and in favor of domestic corporations is said to lie in the fact that domestic corporations enjoy certain exemptions in the computation of their tax base which are denied to foreign corporations. In this contention there is apparent again appellant's studied confusion of the essential differences between a *property* tax and a *franchise* tax. Certain property of domestic corporations, including United States obligations and tangible property having an extraterritorial location is excluded from the valuation of their capital stock for purposes of the direct tax. Obviously, this property could not constitutionally be included. . . ."

It is quite clear from this quotation that if the "Franchise Tax" is a property tax, similar property of foreign corporations must be excluded from the computation of the tax in order to avoid discrimination against foreign corporations.

Under the Constitutions, both of the United States and of Pennsylvania, your petitioner has the right to

be heard in the courts and to have its tax liability determined according to law and justice. In the *National Biscuit* case, *supra*, your petitioner contended that it was not subject to the so-called Mercantile License Tax imposed by the City of Philadelphia, under an enabling act known as the Sterling Act, being the Act of August 5, 1932, P. L. 45, which prohibited the City of Philadelphia from taxing any privilege, transaction, subject, occupation or personal property then or thereafter subject to a State tax or license fee. This enabling act has been construed to prohibit duplication of the same character of taxation by the State and by the City. Your petitioner contended that it was not subject to the Philadelphia tax because the latter was an Excise Tax and therefore duplicated, among others, the Pennsylvania Franchise Tax, which itself was also an Excise Tax, relying upon the cases cited above in which the Supreme Court of Pennsylvania had so held. That Court, however, decided the said case against your petitioner, thereby subjecting it to the Philadelphia tax, upon the ground that the Philadelphia tax was an Excise Tax but that the Pennsylvania Franchise Tax was a property tax and not an excise tax. The rights of your petitioner thus having been determined by the Supreme Court of Pennsylvania adversely on the basis that the Pennsylvania Franchise Tax is a property tax and not an excise tax, it necessarily follows that the imposition of the present tax upon your petitioner, to the extent that it draws into the tax base property having a situs outside of Pennsylvania, whether tangible or intangible, and United States securities owned by your petitioner, is illegal and unconstitutional for reasons specifically set forth elsewhere in this Petition. Furthermore, if, upon the present proceedings initiated by this Petition, the fiscal officers of the Commonwealth should continue

to attempt to impose the tax upon the aforesaid assets, and if any such determination should later be upheld by the courts of the Commonwealth, such determination and/or decision would be inconsistent with the prior decision rendered against your petitioner, would subject petitioner to simultaneous double taxation under two mutually exclusive taxing statutes, would be arbitrary and unreasonable, and would violate the Pennsylvania and Federal Constitutions as more specifically referred to elsewhere in this Petition. Inasmuch as the several decisions of the Supreme Court of Pennsylvania have in each case upheld the power to tax, but upon inconsistent theories as to the nature of the tax, if the decision of the Supreme Court in *National Biscuit Company v. Philadelphia, supra,* should not be followed in this proceeding, representing another reversal of theory as to the nature of the tax, your petitioner avers that it will have been denied a fair trial in the courts and a reasonable adjudication of its rights, all of which would violate the Pennsylvania and Federal Constitutions in the particular respects elsewhere in this Petition set forth.

*Cases, Statutes and Constitutional Limitations Involved.*

1. The tax settlement against petitioner for 1952 having been made upon the theory that the tax is an excise tax and not a property tax is contrary to the Decision of the Supreme Court of Pennsylvania in *National Biscuit Company v. Philadelphia,* 374 Pennsylvania, 604 (1953), and other Decisions of that Court holding the tax to be a property tax.

2. The tax imposed under the provisions of the Act of May 16, 1935, P. L. 184, as amended, having been held to be a property tax as aforesaid, the "fran-

chise tax'' settlement made against your petitioner for 1952 pursuant thereto violates:

(a) Article VI, Clause 2, and Article I, Section 8, Clause 2 of the Constitution of the United States in that the tax is imposed in part upon Petitioner's investment in United States securities.

(b) Section 3701 of the Revised Statutes of the United States, 31 U. S. C. Section 742, which generally exempts interest-bearing obligations of the United States from State and local taxation.

(c) The due process and property clauses, Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that tax is imposed upon tangible and intangible assets of Petitioner which have their situs, outside of Pennsylvania, and which therefore are beyond the taxing power and jurisdiction of Pennsylvania.

(d) The uniformity clause of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions granted to domestic corporations are denied to your petitioner, a foreign corporation.

3. If this tax settlement made against Petitioner for 1952 should now be upheld by the Courts of Pennsylvania upon the ground that the tax is an excise tax, such a decision would violate:

(a) The due process clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(c) Section 1 of Article III of the Constitution of the Commonwealth of Pennsylvania.

(d) Sections 11 and 12 of Article I of the Constitution of Pennsylvania.

(e) Section 2, clause 1 of Article IV of the Constitution of the United States.

(f) Clause 2 of Article VI of the Constitution of the United States.

D. Relief Prayed.

Wherefore, Petitioner prays that the "Franchise Tax" settled against it for the year 1952 be resettled by eliminating therefrom any tax or portion thereof imposed upon or with respect to Petitioner's investment in United States securities, its intangible assets, and/or its other assets having a situs outside of Pennsylvania; and further that the tax be resettled at not over $25,992.95, being at the rate of 5 mills on $5,198,591; and that a credit be allowed for the amount of tax overpaid in at least the amount of $32,328.65.

Petitioner desires a hearing.

Respectfully submitted,

National Biscuit Company

By /s/ G. A. Mitchell,
*Vice President.*

(Corporate Seal)

Attest:

/s/ A. T. Bullock,
*Secretary.*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

G. A. Mitchell, being duly sworn, according to law, deposes and says that he is Vice President of NATIONAL BISCUIT COMPANY; that he is duly authorized to make this affidavit in its behalf; that the foregoing Petition is not made for the purpose of delay, but because Petitioner believes injustice has been done by the settlement of the account for Franchise Tax for the calendar year 1952; that he has read the foregoing Petition and the facts stated therein including facts and figures incorporated by reference are true and correct, according to the best of his knowledge, information and belief.

/s/ G. A. MITCHELL.

Sworn to and subscribed before me this 18th day of January, 1954.

/s/ WILLIAM H. PETERSON,
(Notary's Seal) *Notary Public.*

William H. Peterson
Notary Public, State of New York
No. 31-8344000
Qualified in New York County
Certificates Filed With:
N. Y. Co. Clk. & N. Y. Co. Register's Office
Bronx Co. Clk. & Bronx Co. Reg's Office
Term Expires March 30, 1954

* * *

WE HEREBY CERTIFY that this Petition was prepared by Roy J. Keefer, of Hull, Leiby and Metzger, Attorneys at Law, Harrisburg, Pennsylvania, and by Leslie M. Swope, of Drinker, Biddle & Reath, Attorneys at Law, Philadelphia, Pennsylvania, both of counsel for the Petitioner; that we know of our own knowledge that certain facts therein set forth are true and that all other averments are made on information obtained from the officers and records of Petitioner, and are believed by us to be true.

/s/ ROY J. KEEFER,
Roy J. Keefer,
HULL, LEIBY AND METZGER,
/s/ LESLIE M. SWOPE,
Leslie M. Swope,
DRINKER, BIDDLE & REATH,
*Attorneys for the Company.*

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## EXHIBIT A — FRANCHISE TAX SETTLEMENT.

Printed as Exhibit A, Appeal and Specification of Objections at Pages 13a-14a, *Supra.*

## COMMONWEALTH'S EXHIBIT NO. 3.

### Order Refusing Petition for Resettlement.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF REVENUE
Harrisburg

February 16, 1954

In your reply please
refer to CB:ASB
Box No. 2295-07

HULL, LEIBY & METZGER
208-210 Walnut Street,
Harrisburg, Penna.

In re: National Biscuit Company
449 W. 14th Street,
New York, N. Y.
1952 Franchise Tax

Gentlemen:

AND NOW, TO WIT, 2/11/54 the prayer of the petitioner for the resettlement of the above stated account is hereby refused.

AUDITOR GENERAL'S DEPARTMENT
Harrisburg, Pennsylvania
Approved:

(s) ROBERT B. MARKIW
For Auditor General

DEPARTMENT OF REVENUE
Harrisburg, Pennsylvania
(s) SAMUEL C. HARRY
For Secretary of Revenue

COPY MAILED Feb 17-1954

## COMMONWEALTH'S EXHIBIT NO. 4.

### Petition for Review.

IN THE TREASURY DEPARTMENT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR REVIEW OF FRANCHISE TAX IMPOSED AGAINST NATIONAL BISCUIT COMPANY FOR THE CALENDAR YEAR 1952.

Box 2295-07

TO THE HONORABLE, THE BOARD OF FINANCE AND REVENUE

Sirs:

The petition of NATIONAL BISCUIT COMPANY, hereinafter referred to as petitioner, for review of franchise tax settled against it for the year 1952, and of the refusal by the taxing departments of its Petition for Resettlement of said account, respectfully represents:

On January 26, 1954, petitioner filed with the Department of Revenue its Petition for Resettlement of "Franchise Tax" settled against it by the Department of Revenue on October 28, 1953, and approved by the Department of the Auditor General on November 5, 1953.

On February 11, 1954, after hearing thereon, the Department of Revenue and the Department of the Auditor General refused the prayer of said Petition for Resettlement. A true and correct copy of the notice of refusal, mailed to petitioner on February 17, 1954, is attached hereto, made a part hereof and marked Exhibit "A".

Petitioner respectfully requests your Honorable Board to review the settlement of "Franchise Tax" made against petitioner for the year 1952 and the

refusal by the taxing departments of its Petition for Resettlement of said account. Petitioner's reasons in support thereof are fully set forth in said Petition for Resettlement which is incorporated herein by reference.

WHEREFORE, petitioner prays your Honorable Board to resettle the "Franchise Tax" settled against it for the year 1952 by eliminating therefrom any tax or portion thereof imposed upon or with respect to petitioner's investment in United States securities, its intangible assets, and/or its other assets having a situs outside of Pennsylvania; and further that the tax be resettled at not over $25,992.95, being at the rate of five mills on $5,198,591; and that a credit be allowed for the amount of tax overpaid in at least the amount of $32,328.65.

Petitioner desires a hearing.

Respectfully submitted,

NATIONAL BISCUIT COMPANY

By /s/ G. A. MITCHELL
Vice President

Attest:
(Seal)

/s/ A. T. BULLOCK
Secretary

March 9, 1954.

STATE OF NEW YORK }
COUNTY OF NEW YORK } *ss.:*

G. A. MITCHELL, being duly sworn, according to law, deposes and says that he is Vice President of NATIONAL BISCUIT COMPANY; that he is duly authorized to make this affidavit in its behalf; that the foregoing petition is not made for the purpose of delay, but because petitioner believes injustice has been done by the settlement of the account for franchise tax for the calendar year 1952 and by the refusal of its Petition for Resettlement of said account; that he has read the foregoing petition and the facts stated therein, including facts and figures incorporated by reference, are true and correct, according to the best of his knowledge, information and belief.

/s/ G. A. MITCHELL

Sworn to and subscribed before me this 9th day of March, 1954.

WILLIAM H. PETERSON,
*Notary Public.*
(Seal)

WILLIAM H. PETERSON,
*Notary Public, State of New York*
No. 31-8344000
Qualified in New York County
Certificates Filed with:
N. Y. Co. Clk. & N. Y. Co. Register's Office
Bronx Co. Clk & Bronx Co. Reg's Office
Term Expires March 30, 1954.

• • •

WE HEREBY CERTIFY that this petition was prepared by Roy J. Keefer of Hull, Leiby and Metzger, Attorneys at Law, Harrisburg, Pennsylvania, and by Leslie M. Swope of Drinker, Biddle & Reath, Attorneys at Law, Philadelphia, Pennsylvania, both of counsel for the petitioner; that we know of our own knowledge that certain facts therein set forth are true and that all other averments are made on information obtained from the officers and records of petitioner, and are believed by us to be true.

/s/ ROY J. KEEFER,
Roy J. Keefer.
HULL, LEIBY AND METZGER,
/s/ LESLIE M. SWOPE,
Leslie M. Swope,
DRINKER, BIDDLE & REATH,
*Attorneys for the Company.*

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EXHIBIT A — ORDER REFUSING PETITION FOR RESETTLEMENT.

Printed as Commonwealth's Exhibit No. 3, at Page 38a, *supra.*

## COMMONWEALTH'S EXHIBIT NO. 5.

### Order Refusing Petition for Review.

Docket No. R-12617

IN RE: National Bisquit Company

PETITION FOR REVIEW of action taken by the Department of Revenue and approved by the Department of Auditor General on petition for resettlement of franchise tax for 1952.

AND NOW TO WIT March 17th, A. D. 1954, I certify that the following is the action of the Board of Finance and Revenue of the Commonwealth of Pennsylvania in this matter:

> "And now to wit March 17th, A. D. 1954,
> This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of Auditor General, is hereby sustained."

BY ORDER OF THE BOARD OF FINANCE AND REVENUE

WELDON B. HEYBURN, State Treasurer and Chairman,
FRANK F. TRUSCOTT, Attorney General,
GENE D. SMITH, Secretary of the Commonwealth,
CHARLES R. BARBER, Auditor General,
OTTO F. MESSNER, Secretary of Revenue.

ATTEST: /s/ ELMER G. GRAHAM,
(Seal) Secretary Board of Finance and Revenue.

Copy mailed to: on
HULL, LEIBY & METZGER, March 17, 1954
Attorneys at Law,
Harrisburg, Pennsylvania.

## COMMONWEALTH'S EXHIBIT NO. 6.

### Transcript of Ledger Account.

Commonwealth of Pennsylvania

October 10, 1955.

Subject: National Biscuit Company
Box No. 2295-07
1952 Franchise Tax

To: John Rively, Chief
Judicial Section
Bureau of Corporation Taxes

From: Alex E. Cohen, Assistant Director
Receipts Accounting Division
Department of Revenue

Transcript of the ledger account for the above subject is as follows:

| *Date* | | *Debit* | *Credit* | *Balance* |
|---|---|---|---|---|
| 3-7-52 | Transfer Credit | | 12.72 | 12.72 Cr. |
| 3-5-53 | Payment | | 58,308.88 | 58,321.60 Cr. |
| 11-5-53 | Settlement | 58,321.60 | | 0.00 |
| | | Alex E. Cohen | | |

## COMMONWEALTH'S EXHIBIT NO. 7.

### Stipulation of Facts.

AND Now, October 11, 1955, it is agreed by and between counsel for the COMMONWEALTH OF PENNSYLVANIA and counsel for NATIONAL BISCUIT COMPANY, defendant, that the following facts are true and correct and shall be made a part of the record in this case:

1. Defendant was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business, in Pennsylvania on March 28, 1899 and re-registered on August 21, 1933, under the Business Corporation Law of 1933 to engage in Pennsylvania in the business of "manufacture and sale of bakery products."

2. Defendant's principal office and address are at 449 West Fourteenth Street, New York, New York; and its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

3. During the year 1952, defendant had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President, Secretary and Treasurer were located and performed their duties at 449 West Fourteenth Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey City, New Jersey; and its directors met, its principal bank account was maintained, and its bonds, securities, etc., were kept, in New York City.

4. During the year 1952, defendant was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and it held, owned and controlled at its principal office in New York City its investments in United States securities and in shares of stock of subsidiary companies operating in foreign countries. These investments were made, all activities in connection therewith were carried on, and all income therefrom was received, by that office.

5. For the purposes of this case the business of the subsidiary companies was independent of and unrelated to the business conducted by defendant in the United States, including Pennsylvania.

6. Defendant, at its principal office at 449 West Fourteenth Street, New York, New York, performed administrative and executive functions involving management and control which included production, expenditures, investments, purchasing, pricing, advertising, sales programming, credit, personnel, compensation, accounting, taxes and legal services.

7. The tax involved is the so-called "Franchise Tax", imposed under the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, Sections 1871 and 1901. These acts will be referred to herein as the Act of 1935 and amendments.

8. Using a report form furnished to it by the Department of Revenue, defendant duly completed and filed with that Department its "Franchise Tax" report for the year 1952, which is incorporated herein by reference.

9. As shown by said report and by the corresponding report for 1951, defendant owned inter alia the following as of January 1, 1952 and as of December 31, 1952:

| | *January 1, 1952* | *December 31, 1952* |
|---|---|---|
| Investment in United States securities | $ 19,108,500.00 | $ 26,300,000.00 |
| Investment in shares of stocks of subsidiary companies operating in foreign countries (More than fifty percent owned) | 7,883,161.00 | 8,823,465.00 |
| Investment in tangible property in Pennsylvania | 7,006,593.00 | 6,333,877.00 |
| Cash—demand deposits | 17,377,854.00 | 13,620,326.00 |
| Accounts Receivable | 12,520,993.00 | 10,229,670.00 |
| Total Assets | 185,986,841.00 | 194,941,349.00 |

10. On the basis of said report and pursuant to the purported provisions of the Act of 1935 and amendments, the Department of Revenue, on October 28, 1953, settled and, on November 5, 1953, the Department of the Auditor General approved settlement of a so-called "Franchise Tax" against defendant for the year 1952. A true and correct copy of said settlement, mailed to defendant on November 16, 1953, is attached hereto, made a part hereof and marked Exhibit "A".

11. Said settlement was made by the taxing departments upon the theory that the tax imposed by the Act of 1935 and amendments was an excise tax on

foreign corporations for the privilege of doing business in Pennsylvania:

(a) In said settlement, the taxable value is determined by applying the statutory allocation fractions of tangible property, wages and gross receipts to defendant's entire capital stock valuation of $160,000,000 as determined by the taxing departments and the resulting taxable value is $11,664,320, to which the tax rate of five mills is applied.

(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets times its entire capital stock valuation ($\frac{6,670,235}{194,941,349} \times 160,000,000$), the resulting taxable value would be $5,474,659. It is agreed that this was the method used in settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462.

12. In appraising defendant's entire capital stock at a valuation of $160,000,000, the taxing departments included all of the defendant's tangible and intangible assets as listed in the Balance Sheet of its "Franchise Tax" report for 1952, except its investment in shares of stock of subsidiary companies operating in foreign countries. This investment and the income derived therefrom were excluded by the taxing departments in the appraisal of defendant's capital stock.

13. In settling capital stock tax (construed by the Pennsylvania courts to be a property tax) against

Pennsylvania corporations for the year 1952, the taxing departments treated as exempt or non-taxable assets, investments of such corporations in:

(a) Securities of the United States, its agencies and instrumentalities;

(b) Commonwealth of Pennsylvania bonds;

(c) Shares of foreign corporations more than fifty percent owned whose capital stock represented property and assets located or having a situs outside of Pennsylvania;

(d) Shares of other Pennsylvania corporations liable to or relieved from payments of Capital Stock Tax to Pennsylvania;

(e) Shares of banks and banks and trust companies paying tax on their shares to Pennsylvania; and

(f) Tangible property located outside of Pennsylvania;

whereas such investments of foreign corporations were not accorded similar treatment by the taxing departments in the settlements of the so-called "Franchise Tax" made against foreign corporations, including the defendant, for the year 1952. In the case of Pennsylvania corporations, the tax formula is the tax rate times the taxable value which is obtained by applying the ratio of non-exempt or taxable assets to total assets times the capital stock valuation. In the case of foreign corporations, the tax formula is the tax rate times the taxable value which represents the sum of the results obtained by applying each of the three statutory allocation fractions, where applicable as provided in the 1935 Act and amendatory Acts, to one-third of the capital stock valuation. The Commonwealth objects to the materiality and relevancy of the facts set forth in this paragraph.

14. On January 26, 1954, the defendant filed with the Department of Revenue its Petition for Resettlement of the "Franchise Tax" settled against it for the year 1952 (which Petition is incorporated herein by reference). On February 11, 1954, the Departments of Revenue and Auditor General refused the prayer of said Petition for Resettlement. A true and correct copy of the Notice of Refusal, mailed to defendant under date of February 17, 1954, is attached hereto, made a part hereof and marked Exhibit "B".

15. On March 11, 1954, defendant filed with the Board of Finance and Revenue its Petition for Review of the action of the Departments of Revenue and Auditor General in refusing its Petition for Resettlement (which Petition for Review is incorporated herein by reference); and on March 17, 1954, the said Board refused the prayer of its Petition for Review. A true and correct copy of the Notice of Refusal is attached hereto, made a part hereof and marked Exhibit "C".

16. On April 14, 1954, defendant duly filed with the Prothonotary of Dauphin County its Appeal and Specification of Objections to said settlement and to the refusal of its Petition for Review by the Board of Finance and Revenue; and on May 18, 1954, defendant duly filed an appeal bond as required by law.

17. Defendant made payment in full of the "Franchise Tax" settled against it for the year 1952, as follows:

| | |
|---|---|
| By check—March 5, 1953 | $58,308.88 |
| By transfer of 1951 "Franchise Tax" credit | — 12.72 |
| Total | $58,321.60 |

18. In the event that the tax settlement against defendant is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against defendant in the amount of $58,321.60, which, having been duly paid, should be marked satisfied. If the Court finally determines that Sections 20 and 21 of the Act of June 1, 1889, P. L. 420 as amended by the Act of May 16, 1935 P. L. 184 and subsequent amendatory acts (the last relevant amendatory act being the Act of May 29, 1951, P. L. 462) imposes a property tax on defendant which is determinable on the basis of the computation in Paragraph 11 (b) of this Stipulation, it is agreed that judgment should be entered in favor of the Commonwealth and against the defendant in the amount of $27,373.30, which having been paid should be marked satisfied and a credit of $30,948.30, representing tax overpayment by defendant should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General.

In the event that the Court finally determined this case on any basis other than those hereinbefore set forth in this paragraph, the parties agree that the Record in the present case shall be reopened in order to submit to the Court such additional evidence as may be necessary to enable it to enter judgment.

19. It is further stipulated and agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that the entire record in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in this case is the same as the defendant in the present proceeding) shall be incorporated in the record of the present proceeding by reference as evidence of the

facts and issues in that proceeding, without the necessity of copying the same in the transcript of the record in the present proceeding; and that any part or parts thereof may be quoted in the argument and briefs by either party hereto at any stage, including any appellate stage, of this proceeding, as though fully appearing in the record in the present proceeding, subject to the right of the adverse parties to object to the relevancy or materiality thereof. For the purposes of this paragraph, it is further agreed that the said record shall include, but not be limited to, Appellants' printed Record (Nos. 214, 215 and 216 January Term, 1953), Appellees' printed Supplemental Record (Nos. 214, 215 and 216 January Term, 1953), the Philadelphia Ordinance and the Sterling Act (Act of August 5, 1932, Special Session 1932, P. L. 45) there involved, Appellee's Petition for Reargument (No. 214 January Term, 1953), the opinions of the several justices of the Supreme Court of Pennsylvania, and also, Appellants' Brief and Supplemental Brief (Nos. 214, 215 and 216 January Term, 1953), and Appellees' Brief and Reply Brief (Nos. 214, 215 and 216 January Term, 1953).

The parties hereto further agree that the court, in considering the issues raised in the present proceeding, may examine the printed Briefs and Records and statutes or ordinances in any case decided by the courts of this Commonwealth involving the nature of the Franchise Tax imposed by the Act of 1935 and amendments and of the capital stock tax previously imposed on foreign corporations.

20. The parties hereto reserve the right to introduce additional evidence, not inconsistent herewith, into the record at the time of trial; and to object

to the relevancy or materiality of any such additional evidence offered into the record and to any of the facts contained in the preceding paragraphs herein.

/s/ GEORGE W. KEITEL,
*Deputy Attorney General of the Commonwealth of Pennsylvania.*

HULL, LEIBY AND METZGER,

By /s/ ROY J. KEEFER,

DRINKER, BIDDLE AND REATH,

By /s/ LESLIE M. SWOPE,
*Attorneys for the Defendant.*

**EXHIBIT A—1952 FRANCHISE TAX SETTLEMENT.**

**Printed as Exhibit A. Appeal and Specification of Objections at Pages 13a-14a, Supra.**

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**EXHIBIT B—ORDER REFUSING PETITION FOR RESETTLEMENT.**

**Printed as Commonwealth's Exhibit No. 3 at Page 38a, Supra.**

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**EXHIBIT C—ORDER REFUSING PETITION FOR REVIEW.**

**Printed as Commonwealth's Exhibit No. 5 at Page 43a, Supra.**

## COMMONWEALTH'S EXHIBIT No. 8.

### Agreement to Try Without Jury.

It is agreed that a trial by jury be dispensed with in the above stated case, and that the same be submitted to the decision of the Court to be heard and determined under the provisions of an act entitled "An Act to provide for the submission of civil cases to the decision of the court; and to dispense with trial by jury", approved the 22nd day of April, 1874, P. L. 109, subject, however, to a writ of error as in other cases, at the option of either party.

/s/ GEORGE W. KEITEL,
*Deputy Attorney General.*
/s/ ROY J. KEEFER,
*Counsel for Defendant.*

## AMENDMENTS TO STIPULATION OF FACTS.

AND Now, January 20th, 1956, it is agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that Paragraph 11(b) and Paragraph 18 of the Stipulation of Facts, which has been filed as part of the Record in this case and has been designated as Commonwealth's Exhibit No. 7, shall be amended and as amended shall become a part of the Record in this case and shall read as follows:

"11(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets less its investment in stocks of foreign subsidiaries times its capital stock valuation ( $\frac{6,670,235}{194,941,349 - 8,823,465} \times \$160,000,000$), the resulting taxable value would be $5,734,202, which times the tax rate of five mills produces tax of $28,671.01. It is agreed that the method used in settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, was the ratio of average tangible property in Pennsylvania over *total* assets times the *entire* capital stock value. The difference between this formula and that set forth above as applicable to defendant under the property tax theory for the year 1952 is caused by the fact, as disclosed in para-

graph 12 of the Stipulation of Facts, that defendant's investments in stocks of subsidiaries and the income derived therefrom were excluded in the appraisal of its capital stock at $160,000,000, it being the intention of the parties hereto that said exclusion of stocks of subsidiaries and the income therefrom in said appraisal is not at issue for the purposes of this case."

"18. In the event that the tax settlement against defendant is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against defendant in the amount of $58,321.60, which, having been duly paid, should be marked satisfied. If the Court finally determines that Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, and subsequent amendatory acts (the last relevant amendatory act being the Act of May 29, 1951, P. L. 462) imposes a property tax on defendant which is determinable on the basis of the computation in Paragraph 11(b), as amended, of this Stipulation, it is agreed that judgment should be entered in favor the Commonwealth and against defendant in the amount of $28,671.01, which having been paid should be marked satisfied and a credit of $29,650.59, representing tax overpayment by defendant should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General."

"In the event that the Court finally determines this case on any basis other than those hereinbefore set forth in this paragraph, the parties agree that the Record in the present case

shall be reopened in order to submit to the Court such additional evidence as may be necessary to enable it to enter judgment."

As herein amended, the parties agree that the said Stipulation of Facts shall remain in full force and effect.

/s/ GEORGE W. KEITEL,
*Deputy Attorney General of the Commonwealth of Pennsylvania.*

HULL, LEIBY AND METZGER,

By /s/ ROY J. KEEFER,
*Attorneys for the Defendant.*

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**ORDER.**

AND NOW, this 25th day of January, 1956, the above Amendments to the Stipulation of Facts is admitted in evidence as part of the Record in the above entitled case.

WILLIAM H. NEELY
*J.*

## DEFENDANT'S EXHIBIT NO. 1.

**Relevant Portions of Record and Briefs in Case of National Biscuit Company v. Philadelphia, 374 Pa. 604.**

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### Complaint in Equity.

(Exhibits Thereto Not Printed.)

The Complainant, National Biscuit Company, brings this Bill of Complaint against the City of Philadelphia, George S. Forde, Revenue Commissioner of the City of Philadelphia, and Walter Pytko, Commissioner of Licenses and Inspections of the City of Philadelphia, and complains and says:

1. Complainant, National Biscuit Company, is a foreign corporation organized under the laws of New Jersey and having its principal office at 449 West 14th Street, New York, New York. It is duly authorized to do business in the Commonwealth of Pennsylvania and has a factory and place of business in Philadelphia at 1215 W. Glenwood Avenue, Philadelphia, Pennsylvania. Complainant was, during the year 1952, and still is, engaged in the business of manufacture and sale of bakery products, both within and without the City of Philadelphia, and both within and without the Commonwealth of Pennsylvania, and in connection therewith is engaged in interstate commerce.

2. Defendant, City of Philadelphia, is a municipal corporation, created and existing under and pursuant

to the laws of the Commonwealth of Pennsylvania and is a city of the first class thereof.

3. Defendant, George S. Forde, resides at 421½ East Slocum Street, Philadelphia, Pennsylvania, is Revenue Commissioner of the City of Philadelphia, and, pursuant to the provisions of Section 3-101 of the Philadelphia Home Rule Charter (adopted April 17, 1951 pursuant to the authority of the Act of April 21, 1949, P. L. 665), is the head of the Department of Collections of the City of Philadelphia and is charged with the duty (personally, or by deputies or duly authorized agents or employees) of exercising the powers and performing the duties vested in and imposed upon the Department of Collections.

4. Defendant, Walter Pytko, resides at 4476 East Thompson Street, Philadelphia, Pennsylvania, is Commissioner of Licenses and Inspections of the City of Philadelphia, and, pursuant to the provisions of Section 3-101 of the said Philadelphia Home Rule Charter, is the head of the Department of Licenses and Inspections of the City of Philadelphia and is charged with the duty (personally, or by deputies or duly authorized agents or employees) of exercising the powers and performing the duties vested in and imposed upon the Department of Licenses and Inspections.

5. The City of Philadelphia, by Ordinance approved December 9, 1952, a copy of which is attached hereto and made part hereof, marked "Exhibit A", has attempted (Section 3) to impose a so-called Mercantile License Tax on your Complainant, for the year 1953 and annually thereafter, at the rate of three (3) mills on each dollar of the annual gross volume of

business transacted in Philadelphia during the year 1952 and annually thereafter, or, in the alternative, at the optional rates and on the optional basis therein more fully set forth; and also has attempted (Section 2) to require Complainant to pay a license fee of Three Dollars ($3.00) and to procure a mercantile license, beginning in the year 1953 and annually thereafter, for each of its places of business in said City.

6. Said Ordinance was passed pursuant to the purported authority of the Act of August 5, 1932, Extra Sessions P. L. 45, 53 P. S. Section 4613, known as the "Sterling Act", which provides, however, that the City of Philadelphia shall not have authority to levy, assess and collect "any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State Tax or license fee".

7. Complainant is subject to and pays annually to the Commonwealth of Pennsylvania a corporate net income tax under the Act of May 16, 1935, P. L. 208, as last reenacted and amended by the Act of December 27, 1951, P. L. 1746, 72 P. S. Section 3420 a-n. The last tax report filed by Complainant with the Commonwealth under this statute was for the year 1951, a copy of which is attached hereto and made part hereof, marked "Exhibit B". The tax shown to be due on said report, amounting to $110,095.20, was duly paid and the Commonwealth made a settlement of tax against Complainant in the amount so paid, as evidenced by its certificate of settlement, a copy of which is attached hereto and made part hereof, marked "Exhibit C". Said tax return for 1951 is representative of the Pennsylvania corporate net income tax report

that will be due and filed for 1952 and for subsequent years. It is estimated that the corporate net income tax payable to Pennsylvania for the year 1952 will be in excess of that paid for 1951.

8. Complainant is subject to and pays annually to the Commonwealth of Pennsylvania a franchise tax under the Act of June 1, 1889, P. L. 420, Sections 20 and 21, as last amended by the Acts of May 16, 1945, P. L. 606, Section 1, and of May 29, 1951, P. L. 462 Section 1, 72 P. S. Sections 1871, 1901 (see Sections 1871-1901). Under said statute Complainant duly filed a tax report for the year 1951 and paid to the Commonwealth of Pennsylvania for the year 1951 a tax amounting to $56,915.44 in accordance with said report. A copy of said tax report is attached hereto and made a part hereof marked "Exhibit D". The settlement of tax made against Complainant by the fiscal agents of the Commonwealth was in the amount of $56,854.40. A copy of the settlement certificate is attached hereto and made a part hereof marked "Exhibit E". Said tax return is representative of the Pennsylvania franchise tax reports of Complainant for subsequent years. Although not yet due, Complainant has filed its Pennsylvania franchise tax report for 1952, and has paid the tax shown thereon, amounting to $58,308.88, to the Commonwealth.

9. Complainant also pays to the School District of Philadelphia an annual tax on gross receipts as therein defined at the rate of one (1) mill, pursuant to the provisions of the Act of May 23, 1949, P. L. 1669, as amended by the Act of May 10, 1951, P. L. 265, and as further amended by the Act of September 29, 1951, P. L. 1629, 24 P. S. Section 584.1-584.12. On or before

May 15, 1952, as required by law, Complainant filed its tax return under said statutes for the year 1952, based upon gross receipts for 1951, and paid the tax therein reported, amounting to $3,282.63. A copy of said tax return is attached hereto and made a part hereof marked "Exhibit F". Said tax return is representative of the Philadelphia School District tax reports of Complainant for subsequent years.

10. Complainant is also subject to regulation by the Department of Agriculture of the Commonwealth under the Act of May 22, 1933, P. L. 912, as amended, 43 P. S. Sections 403-408, and is required under Section 3 thereof to pay a license fee to and obtain a license from the Department of Agriculture, annually, as a condition precedent to operating any bakery in the Commonwealth. Said license fees are graduated in amounts ranging from $5 to $20 for each bakery, based upon the number of barrels of flour used per week. During the year 1952 Complainant paid to the Commonwealth of Pennsylvania $185 in such license fees.

11. On the basis of its operations for 1952 and prior years, it is estimated that the mercantile license tax, which Defendants are attempting to impose upon Complainant for the year 1953, will amount to more than $10,000, computed at three mills on gross volume of business, which is more favorable to Complainant than the alternative methods of computation provided in the Ordinance.

12. Complainant is advised by counsel, believes, and therefore avers that, on the basis of the foregoing facts, the Ordinance and attempted imposition of a

mercantile license fee and tax upon Complainant by the City of Philadelphia, herein complained of, is contrary to law, null and void, and without legal effect, for the reasons, inter alia:

(1) That the aforesaid mercantile license fee and tax levy, as applied to Complainant, are not authorized by the Act of August 5, 1932, Ex. Sess. P. L. 45, 53 P. S. Section 4613, known as the Sterling Act; but, on the contrary, are prohibited by such statute, because, inter alia, Complainant is subject to and pays the State taxes and license fees above mentioned.

(2) That the said mercantile license fee and tax are also contrary to Section 18 (a) (8) (9) of the Act of April 21, 1949, P. L. 665, 53 P. S. Section 3421.18, known as the "First Class City Home Rule Act", in that the City is attempting to exercise powers contrary to, or in enlargement of, powers granted by Acts of the General Assembly which limit rates and fix subjects of taxation or provide for the assessment of real or personal property and persons for taxation purposes.

(3) That the said Ordinance violates Section 2-201 of the Philadelphia Home Rule Charter, adopted by the Electors on April 17, 1951, pursuant to the First Class City Home Rule Act, April 21, 1949, P. L. 665, Section 17, 53 P. S. Section 3421.17, which Section provides that every ordinance, except annual budget ordinances and general codifications and revisions of City ordinances, shall contain not more than one subject which shall be clearly and adequately expressed in its title.

(4) That the said Ordinance, herein complained of, is so vague, uncertain, inconsistent and incomplete in its provisions, and the application thereof to Complainant would be so arbitrary and unreasonable, that it cannot be enforced against Complainant; and that any attempt to enforce the same against Complainant would violate the due process clauses of the Pennsylvania Constitution (Art. I, Secs. 9, 10, 11) and of the Federal Constitution (Fourteenth Amend. Sec. 1); the uniformity clause of the Pennsylvania Constitution (Art. IX, Sec. 1); the equal protection clause of the Federal Constitution (Fourteenth Amend. Sec. 1); and the commerce clause of the Federal Constitution (Art. I, Sec. 8, subsec. 3).

13. Notwithstanding the foregoing, Complainant is advised by counsel, believes and therefore avers that the Law Department of the City of Philadelphia, although requested, has refused to issue any ruling that a corporation is not subject to the said City mercantile license tax if it pays any or all of the aforesaid State taxes, or that any business paying State license fees is not taxable under the said Ordinance. The Regulations adopted thereunder recognize certain grounds for not applying the tax, but not those set forth in this Complaint (Sec. 303 (b)). Defendants are threatening to enforce the said Ordinance against, and to collect the said mercantile license tax and fee from, your Complainant.

14. Under the Ordinance herein complained of, your Complainant will be subject to severe penalties and interest payments at the rate of 18% per annum for non-compliance therewith, its right of refund under

the Ordinance in case of erroneous payment is not clearly expressed or provided, and the determination of legal questions involved will require a multiplicity of suits, at common law, unless equity will take jurisdiction over the case on its merits. Your Complainant is advised by counsel, believes, and therefore avers, that it does not have an adequate remedy at law.

WHEREFORE, your Complainant prays this Honorable Court (a) to take jurisdiction of this suit; (b) to declare the aforesaid Ordinance herein complained of to be inapplicable, null and void, insofar as your Complainant is concerned; (c) to enjoin and restrain the Defendants above named and all other officers and agents of the City of Philadelphia from taking any further action to assess or collect the tax from your Complainant under the provisions of the aforesaid Ordinance; and (d) to grant such other and further relief as may be just and equitable.

/s/ LESLIE M. SWOPE,
Leslie M. Swope.
/s/ CHARLES J. BIDDLE,
Charles J. Biddle.
DRINKER BIDDLE & REATH
117 South 17th Street
Philadelphia 3, Pa.
*Attorneys for Complainant.*

**Defendants' Answer.**

1-4. Admitted.

5. Exhibit "A" is admitted.

6. The provisions of the Sterling Act of August 5, 1932, P. L. 45 speak for themselves, but have no application to the power of the City to impose taxes similar to the City Mercantile License Taxes.

7. Defendants admit plaintiff pays the State Corporate Net Income, but the amount is immaterial.

8. Defendants admit plaintiff pays the State Franchise Tax but the amount is immaterial.

9. No answer required as same is immaterial.

10. The Act of May 5, 1933 P. L. 912 as amended, 43 P. S. 403-408 speaks for itself. The total amount paid by plaintiff is immaterial.

11. Defendants have no knowledge, and demand proof. This averment is immaterial.

12. Denied.

13. Admitted that the Law Department considers plaintiff subject to the provisions of the City Mercantile License Tax Ordinance.

14. Defendants admit that the Court has jurisdiction to hear and determine the subject matter of the Complaint, but deny that plaintiff is entitled to the relief prayed for.

/s/ ABRAHAM WERNICK
Abraham Wernick
Deputy City Solicitor
ABRAHAM L. FREEDMAN
City Solicitor
*Attorneys for Defendants.*

**Philadelphia Ordinance Approved by Mayor December 9, 1952.**

AN ORDINANCE

To provide revenue by imposing a mercantile license tax on persons engaging in certain businesses, including manufacturing, professions, occupations, trades, vocations, and commercial activities in the City of Philadelphia; providing for its levy and collection; providing for the issuance of mercantile licenses, conferring and imposing powers and duties on the Department of Collections and on the Department of Licenses and Inspections; and imposing penalties.

*The Council of the City of Philadelphia hereby ordains:*

SECTION 1. Definitions.

(a) "Person" means any individual, partnership, association, or corporation. Whenever used in any clause prescribing or imposing a penalty, the term "Person" as applied to associations shall mean the partners or members thereof, and as applied to corporations, the officers thereof.

(b) "Wholesale Dealer" or "Wholesale Vendor" means any persons who sells to dealers in, or vendors of, goods, wares and merchandise.

(c) "Retail Dealer" or "Retail Vendor" means any person who is a dealer in or vendor of goods, wares, and merchandise who is not a wholesale dealer or vendor.

(d) "Manufacturer" means any person who sells goods, wares and merchandise of his own growth, or production.

(e) "Business" means the carrying on or exercising for gain or profit within the City of Philadelphia of any trade, business, profession, vocation, or making sales to persons within the City of Philadelphia, or of any manufacturing, commercial or financial activity, service or business, including but not limited to manufacturers, brokers, wholesale dealers or wholesale vendors, retail dealers or retail vendors.

"Business" shall not include the following: Any business conducted by a non-profit corporation or association organized for religious, charitable or educational purposes; or any authority created and organized under and pursuant to any Act of Assembly; the business of any insurance company, association or exchange, or any fraternal, benefit, or beneficial society of any other state under the laws of which insurance companies, associations or exchanges, or fraternal, benefit, or beneficial societies of this Commonwealth doing business in such other state would be subjected by reason of the tax imposed by this Ordinance to additional or further taxes, fines, penalties or license fees by such other state; and any employment for a wage or salary.

(f) "Financial Business" means the services and transactions of private banks and bankers, building and loan associations, savings and loan associations, credit unions, savings banks, banks, bank and trust companies, trust companies, investment companies registered as such with the Federal Securities and Exchange Commission, holding companies, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors and commission merchants.

(g) "License year" means the twelve-month period corresponding to the fiscal year of the City.

(h) "Gross Volume of Business" means gross receipts and shall include both cash and credit transactions. It shall exclude:

(1) the dollar volume of annual business covering the resale of goods, wares or merchandise taken by a dealer as a trade-in or as part payment for other goods, wares and merchandise in the usual and ordinary course of his business, except to the extent that the resale price exceeds the trade-in allowance;

(2) in the case of a financial business, the cost of securities and other similar property sold, exchanged, paid at maturity, or redeemed, and moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount of such advances, credits and loans and shall exclude deposits;

(3) the receipts or the portion thereof attributable to any item of sale involving the bona fide delivery of goods, commodities, wares or merchandise to a location regularly maintained by the other party to the transaction outside the limits of the City of Philadelphia and not for the purpose of evading payment of the tax or any portion thereof imposed under this ordinance.

For the purpose of determining the gross volume of business from the business of insurance, such receipts shall mean those from premiums received from risks within the City of Philadelphia, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever.

(i) "Temporary, seasonal or itinerant business" means any business that is conducted for less than sixty (60) consecutive calendar days in any one calendar year.

SECTION 2. Licenses. Beginning in the year 1953, and annually thereafter, every person desiring to engage in or to continue to engage in any business shall, on or before the first day of January in each license year, or prior to the first day of business in any such license year, procure a mercantile license for each of his places of business in the City, from the Department of Licenses and Inspections which shall issue the same upon payment of a fee of three (3) dollars for each place of business in the City. Such license shall be conspicuously posted at each place of business of every such person at all times.

SECTION 3. Imposition and Rate of Tax. Every person engaging in any of the following businesses in the City shall, in addition to paying a license fee, as herein provided, pay an annual mercantile license tax for the license year 1953 and annually thereafter at the rate set forth:

(a) (1) A wholesale dealer or wholesale vendor at the rate of three (3) mills on each dollar of the volume of the annual gross volume of business transacted by such person, or,

(2) In the alternative, at the option of the wholesale dealer or wholesale vendor at the rate of three (3) per centum of the annual gross volume of business transacted by such person less the cost of goods and less the cost of labor.

(b) (1) A dealer or vendor who sells both at wholesale and retail at the rate of three (3) mills on each dollar of the annual gross volume of

wholesale business transacted by such person and three (3) mills on each dollar of the volume of the annual gross volume of retail business transacted by such person, or,

(2) In the alternative, at the option of the dealer or vendor who sells both at wholesale and retail at the rate of three (3) per centum of the annual gross volume of wholesale business transacted by such person less the cost of goods and less the cost of labor and at the rate of three (3) mills on each dollar of the annual gross volume of retail business transacted by such person.

(c) (1) A manufacturer at the rate of three (3) mills on each dollar of the annual gross volume of business transacted by such person, or,

(2) In the alternative, at the option of the manufacturer at the rate of two (2) per centum of the annual gross volume of business transacted by such person less the cost of goods and less the cost of labor.

(d) (1) A manufacturer who sells also at retail at the rate of three (3) mills on each dollar of the annual gross volume of wholesale business transacted by such person and three (3) mills on each dollar of the annual volume of gross retail business transacted by such person, or,

(2) In the alternative at the option of the manufacturer who sells also at retail at the rate of two (2) per centum of the annual volume of gross wholesale business transacted by him, less the cost of good and less the cost of labor, and at the rate of three (3) mills on each dollar of the annual volume of gross retail business transacted by such person.

(e) All other persons engaged in business at the rate of three (3) mills on each dollar of the annual gross volume of business transacted.

SECTION 4. Computation of Volume of Business.

(a) Every person subject to the payment of the tax hereby imposed who has commenced his business at least one (1) full year prior to the beginning of any license year shall compute his annual gross volume of business upon the actual gross amount of business transacted by him during the preceding year.

(b) Every person subject to the payment of the tax hereby imposed, who has commenced his business less than one (1) full year prior to the beginning of any license year, shall compute his annual gross volume of business for such license year upon the gross volume of business transacted by him prior to such license year divided by the number of months in business during such prior year and multiplied by twelve.

(c) Every person subject to the payment of the tax hereby imposed, who shall commence his business subsequent to the beginning of any license year, shall compute his annual gross volume of business for that license year upon the gross volume of business transacted by him from the time of commencing business until the first day of December of that license year, divided by the number of months in business during such period and multiplied by the number of months between the time of commencing business and the end of that license year.

(d) Every person subject to the payment of the tax hereby imposed who engages in a tempo-

rary, seasonal or itinerant business shall compute his annual gross volume of business upon the actual gross volume of business transacted by him during such license year.

SECTION 5. Returns.

(a) Every return shall be made upon a form furnished by the Department of Collections.

(b) Every person subject to the tax imposed by this ordinance who has commenced his business at least one (1) full year prior to the beginning of any license year shall on or before the fifteenth day of March following file with the Department of Collections a return setting forth his name, his business and business address, and such other information as may be necessary in arriving at the annual gross volume of business transacted by him during the preceding year and the amount of the tax due.

(c) Every person subject to the tax imposed by this ordinance who has commenced his business less than one (1) full year prior to the beginning of any license year shall on or before the fifteenth day of March following, file with the Department of Collections a return setting forth his name, his business, business address, and such other information as may be necessary in arriving at the annual gross volume of business transacted by him during such period and the amount of tax due.

(d) Every person subject to the tax imposed by this ordinance who shall commence business subsequent to the beginning of any license year shall, on or before the tenth day of December of such license year, file a return with the Depart-

ment of Collections setting forth his name, his business, and business address, and such information as may be necessary in arriving at the annual gross volume of business transacted by him during such period and the amount of the tax due.

(e) Every person subject to the payment of the tax imposed by this ordinance who engages in a temporary, seasonal or itinerant business shall, within seven (7) days from the day he completes such business during any license year, file a return with the Department of Collections setting forth his name, his business, and business address, and such information as may be necessary in arriving at the actual gross volume of business transacted by him during such period and the amount of the tax due.

SECTION 6. Payment. At the time of filing the return the person making the same shall pay to the Department of Collections the amount of tax shown as due thereon.

SECTION 7. Powers and Duties of Department of Collections.

(a) It shall be the duty of the Department of Collections to collect and receive the taxes, interest, fines and penalties imposed by this ordinance. It shall keep a record showing the amount received from each person paying the tax, interest, fine and penalty and the date of such receipt.

(b) The Department of Collections is hereby charged with the administration and enforcement of the provisions of this ordinance, and is hereby empowered to prescribe, adopt, promulgate and enforce regulations relating to any matter pertaining to the administration and enforcement of this

ordinance, including provision for the re-examination and correction of returns, and payments alleged or found to be incorrect, or as to which an over-payment is claimed, or found to have occurred.

(c) The Department of Collections is hereby authorized to examine the books, papers and records of any person in order to verify the accuracy of any return made, or, if no return has been made, to ascertain the tax due. Every such person is hereby directed and required to give to the Department of Collections the means, facilities and opportunity for such examinations and investigations as are hereby authorized.

SECTION 8. Suit on Collections; Penalty.

(a) The City of Philadelphia may sue for the recovery of taxes, interest, fines and penalties due and unpaid under this ordinance.

(b) If for any reason the tax is not paid when due in each year, interest at the rate of six (6) per centum per annum on the amount of said tax, and in addition a penalty of one (1) per centum of the amount of the unpaid tax for each month or fraction thereof during which the tax remains unpaid shall be added and collected. Where suit is brought for the recovery of any such tax, the person liable therefor, shall, in addition, be liable for the costs of collection and the interest and penalties herein imposed.

SECTION 9. Fine and Penalties. Whoever makes any false or untrue statement on his return, or who refuses to permit inspection of the books, records or accounts of any business in his custody or control, when the right to make such inspection by the Department

of Collections is requested, and whoever fails or refuses to file a return required by this ordinance, and whoever fails or refuses to procure a mercantile license when so required under this ordinance, or fails to keep his license conspicuously posted at his place of business as required herein, shall, upon conviction before any magistrate, be sentenced to pay a fine of not more than three hundred (300) dollars for each offense, and in default of payment of said fine shall be imprisoned for a period of not more than ninety (90) days for each offense.

SECTION 10. Other Taxes. It is hereby declared to be the intention of the Council that the tax imposed under this ordinance shall be in addition to any and all other taxes imposed by the City of Philadelphia.

SECTION 11. Saving Clause.

(a) Nothing contained in this ordinance shall be construed to empower the City to levy or collect the tax hereby imposed on any person, or any business, or any portion of any business not within the taxing power of the City under the Constitution of the United States or the Constitution or laws of the Commonwealth of Pennsylvania.

(b) If for any reason any or all of the alternative methods of computing the tax provided for in Section 3(a) (2) or 3(b) (2) or 3(c) (2) or 3(d) (2) be declared invalid, then it is hereby declared to be the intention of the Council that such invalidity shall not impair the validity of Section 3(a) (1) or 3(b) (1) or 3(c) (1) or 3(d) (1) and that Section 3(a) (1), 3(b) (1), 3(c) (1), 3(d) (1) and all other sections of this ordinance shall remain in full force and effect as if the invalid section or sections had not been adopted.

**(c) If the tax, or any portion thereof, imposed by this ordinance shall be held by any court of competent jurisdiction to be in violation of the Constitution of the United States or of the Constitution or laws of the Commonwealth of Pennsylvania, as applied to any person, the decision of the court shall not affect or impair the right to impose the tax, or the validity of the tax so imposed upon other persons as herein provided.**

## Relevant Part of Sterling Act.

Section 1 of Act of August 5, 1952 Ex. Sess., P. L. 45, 53 P. S. 4613:

"Section 1. Be it enacted, &c., That from and after the effective date of this act, the council of any city of the first or second class shall have the authority by ordinance, for general revenue purposes, to levy, assess and collect, or provide for the levying, assessment and collection of, such taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of such city of the first or second class, as it shall determine, except that such council shall not have authority to levy, assess and collect, or provide for the levying, assessment and collection of, any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a State tax or license fee. If, subsequent to the passage of any ordinance under the authority of this act, the General Assembly shall impose a tax or license fee on any privilege, transaction, subject or occupation, or on personal property, taxed by any city of the first or second class hereunder, the act of Assembly imposing the State tax thereon shall automatically vacate the city ordinance passed under the authority of this act as to all taxes accruing subsequent to the effective date of the act imposing the State tax or license fee." • • •

**Relevant Excerpts From Appellee's Brief in Supreme Court of Pennsylvania (374 Pa. 604)**

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**I. Counter-Statement of Questions Involved.**

* * *

2. Can the Mercantile License Tax Ordinance be legally enforced against the several Appellees, under the Sterling Act, in view of the fact that they are subject to one or more of the following taxes imposed by the Commonwealth—tax on net earnings, corporate net income tax, foreign franchise tax, and the capital stock tax?

Negatived by the court below.

**II. Counter-History of the Case.**

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(a) *Form of Action and Pleadings.*

All of the above cases are actions in equity to restrain the City of Philadelphia and certain officials thereof from enforcing the Philadelphia mercantile license tax ordinance approved December 9, 1952, against the respective Complainants. The cases were entered to the dockets of other courts, but were duly transferred to the Court of Common Pleas No. 2 for purposes of a consolidated hearing. This was considered desirable by all parties, because the several cases presented various aspects of the question whether the ordinance is valid. The ordinance was amended on March 9, 1953, and again on April 13, 1953, so as to extend the time for taking out the license or paying the tax for the year 1953, but the amendments are immaterial to the questions raised in this case.

There is no dispute about the facts. The Defendants duly filed Answers, admitting some facts set forth in the Complaint and demanding proof of others. A Stipulation was filed, in each case, setting forth additional facts agreed upon, subject to the objection of the Defendants in some instances that such facts are irrelevant and immaterial. (17a, 42a, 67a).

The cases were heard upon the Complaints and Answers thereto, and the Stipulations of additional facts; and also upon a Stipulation in each case (approved by the Court) as to the procedure, the effect of which was to treat the Court's adjudication as its final decree for purposes of appeal (75a).

The hearing was held before the court en banc on March 24, 1953, Judges Edwin O. Lewis and Vincent A. Carroll being present (President Judge Gordon was absent because of illness). The court handed down its decree on April 14, 1953 in favor of Complainants and enjoining Defendants from enforcing the provisions of the Ordinance against Complainants, to be followed by an opinion, which issued on April 17, 1953. Defendants thereupon took these appeals to this Court.

(b) *Summary of the Facts.*

* * *

THE NATIONAL BISCUIT COMPANY CASE.

National Biscuit Company is a foreign corporation engaged in the business of manufacture and sale of bakery products, both within and without the Commonwealth of Pennsylvania, and is engaged in interstate commerce in connection therewith (4a, 16a). It is subject to and pays annually to the Commonwealth of Pennsylvania a corporate net income tax which, for the year 1951, amounted to $110,095.20 (6a, 16a). It is also subject to and pays annually to the Commonwealth

a franchise tax which, for the year 1951, amounted to $56,854.40 (6a, 16a).

The company is subject to regulation by the Department of Agriculture under the statutes of Pennsylvania and is required thereunder to pay a license fee and obtain a license from the Department of Agriculture annually as a condition precedent to operating any bakery in the Commonwealth. These license fees are graduated in amounts ranging from $5 to $20 for each bakery based upon the number of barrels of flour used per week (7a, 16a, S 128a). During the year 1952 the company paid to the Commonwealth of Pennsylvania $185 in such license fees for the privilege of doing business during 1953 (7a, 16a).

## III. Argument.

* * *

2. *The Mercantile License Tax Ordinance Cannot Be Enforced Against Appellees Because They Pay Either a Tax on Net Earnings or the Corporate Net Income and the Franchise or Capital Stock Tax, to the Commonwealth.*
(Pars. 1 and 3 of each Statement under Rule 22.)

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(a) *The underlying purpose of the tax limitation in the Sterling Act was to protect the Commonwealth's sources of revenue; and the question whether the City has encroached upon the Commonwealth's preserve must be determined on the basis of substance and fact, and not according to refined technicalities.*

The Sterling Act is therefore the source of the City's power to tax, insofar as this case is concerned. The *power to tax so given must be strictly construed and not extended by implication. Murray v. Philadel-*

*phia,*[1] 364 Pa. 157, 163 (1950), and cases therein cited. The Sterling Act allows the City of Philadelphia to tax "persons, transactions, occupations, privileges, subjects and personal property within the limits of such City" and then expressly limits that power by providing that the City shall not have authority to levy "any tax on a privilege, transaction, subject or occupation, or on personal property, which is now or may hereafter become subject to a *State tax* or license fee."

The purpose of this limitation is not left in doubt. The statute expressly provides in Section 1:

> ". . . It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects of taxation which the Commonwealth has power to tax but which it does not now tax or license, subject only to the foregoing provision that any tax upon a subject which the Commonwealth may hereafter tax or license shall automatically terminate upon the effective date of the State act imposing the new tax or license fee."

In *Sley System Garages v. Philadelphia,* 135 Pa. Super. 440 (1939), the Superior Court said, with respect to the limitations contained in the Sterling Act that (p. 448):

> ". . . We assume also that the legislature showed by the proviso that it was interested in preserving to the state the sources of taxes already drawn upon and did not wish the city to take such income from it."

---

1. After quoting "it is a principle universally declared and admitted that municipal corporations can levy no taxes—unless the power is plainly and unmistakably conferred" from Dillon on Municipal Corporations, Justice Linn said that "the grant of such right is to be strictly construed, and not extended by implication" (p. 163).

Likewise, in *Pittsburgh Milk Co. v. Pittsburgh*, 360 Pa. 360, 363-4 (1948), Mr. Justice Drew, in speaking of the similar Enabling Act 481 of June 25, 1947, P. L. 1145, 53 P. S. 2015.1, said:

> "Act 481 of 1947 was designed for the financial relief of local municipalities. It broadened the tax base for Pittsburgh but at the same time it did impose a limitation on the City's right to tax. *The State reserved to itself the right to select its own subjects of taxation and provided that the City may not invade those tax fields necessary for the maintenance of the State government. . . .*" (Emphasis supplied.)

The same thing was said of Act No. 481 of 1947 by the Common Pleas Court of Erie County, in *In re Erie Gross Receipts Tax*, 73 D. & C. 313 (1950), at p. 314:

> "While the Act of June 25, 1947, authorizes municipalities to levy a tax in certain instances, it withholds from municipalities the right to levy, assess and collect any tax on a privilege, transaction or subject which is now or hereafter becomes subject to a State tax or license fee. *It will thus be noted that the State carefully guards against any municipality tapping the sources of revenue considered necessary for State purposes. . . .*". (Emphasis supplied.)

It is therefore apparent, not only from the express legislative intent stated in the Sterling Act, but also from the above quoted statements of the courts, that the purpose of the limitations in the Sterling Act was to protect the state's sources of revenue. Where the city attempts to levy a tax which may infringe upon a state tax, the practical operation of the two taxes is controlling and the issue is not to be determined by

subtle refinements of terminology or nice technicalities.

In *Murray v. Philadelphia*, 364 Pa. 157 (1950), Mr. Justice Linn, speaking for the Court, said (p. 165):

> "The legislative prohibition 'that such council shall not have authority' to tax anything 'which is *now* or *may hereafter* become subject to a State tax or license fee' was intended to prevent double taxation of the same thing; in other words, *the city was instructed that it could not tax subjects taxed by the state. The right of the state was paramount.* . . .
>
> "In determining whether double taxation results, whether the city tax conflicts with that imposed by the State, *the practical operation of the two taxes is controlling as against mere difference in terminology* from time to time employed in describing taxes in various cases. This is illustrated by *Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936). See also *Com. v. Union Trust Co.*, 345 Pa. 298, 307-8, 27 A. 2d 15 (1942)." (Emphasis supplied.)

(b) *Murray v. Phila., 364 Pa. 157 (1950) is controlling.*

The *Murray* case arose upon an attempt of the city, by an ordinance passed in December 1949, to extend the then existing city income tax to corporations and other subjects of taxation theretofore not taxed by the ordinance. The city attempted to impose a tax upon the net income of such corporations at the rate of 1¼%.

Murray contended that the city could not tax him on dividends received from corporations paying the Pennsylvania Corporate net income tax. The Court upheld his contention, saying (p. 169):

". . . The income, having been deducted from already taxed corporate property for purposes of distribution to the beneficial owners, is property which the Sterling Act prohibits the city from taxing. *In construing the Act, it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls.* The fact that this tax is paid to the state conclusively shows that the city has no jurisdiction to tax the corporate income. . . ." (Emphasis supplied.)

Murray further contended that the city could not tax him on dividends received from corporations paying the Pennsylvania capital stock tax or franchise tax. The Court also upheld this contention, saying (p. 168):

". . . When the corporation pays to its stockholders income out of the property on which the capital stock tax has been paid, the city may not again tax the income in the hands of the stockholder; and the reason is that the Sterling Act did not confer the power to tax the 'subject' that the state had taxed; on the contrary, tax was prohibited. . . . ."

Since this Court held that Murray could not be taxed on money distributed to him by a corporation that had already been taxed by the State, a fortiori the corporation itself which had been taxed by the State, cannot be taxed again on the same income. This Court expressly decided the latter point.

Sheridan Transportation Company, a foreign corporation, was a party plaintiff in the *Murray* case and contended that the city's net income tax could not be imposed upon it, because it paid the corporate net in-

come tax and also the franchise tax. This Court upheld its contention, saying (p. 174):

> "Sheridan Transportation Company, plaintiff at number 144, is a corporation of the State of Delaware, with its principal office in the city of Philadelphia. It denies the power of the city to tax the income of corporations which are liable to taxation by Pennsylvania under the provisions of the foreign corporation franchise tax Act of June 1, 1889, P. L. 420, as amended, 72 PS 1871 (b) and the corporate net income tax Act of May 16, 1935, P. L. 208, as re-enacted and amended, 72 PS 3420 et seq. With respect to this plaintiff, the city says: 'The question directly involved is whether the said foreign corporation Franchise Tax is a tax on income, for it is quite obvious that if it is not a tax on income, then the amendatory ordinance of December 9, 1949, taxing net income derived from business in Philadelphia by foreign corporations is not a duplication of the foreign corporation Franchise Tax.' Earlier in this opinion, it was noted that the franchise tax was regarded as an equivalent of the capital stock tax and that, while considered an excise tax in some contexts, in others it was regarded as a tax on property. As the capital stock tax and the franchise tax are paid out of the corporate property, the income is not taxable by the city."

F. W. Hoffman Co. Inc., a Pennsylvania corporation, intervened in the Murray case and made the same argument, based upon its liability for the state income and capital stock taxes. The Court said (p. 174):

> "F. W. Hoffman Co. Inc., intervenor, a Pennsylvania Corporation with its principal office in Philadelphia, subject, like all domestic corpora-

tions, to the capital stock tax, also pays the corporate net income tax. For reasons stated earlier in this opinion, the city has no power to tax its income."

The Philadelphia Saving Fund Society and the other three saving funds, which are Complainants in the present suit, were also allowed to intervene in the *Murray* case. They contended that the city could not impose a tax upon their net income under the Sterling Act because they were subject to a state tax of 3% on their net earnings under the Act of June 1, 1889 P. L. 420, sec. 27, as amended, 72 P. S. § 2241.* This Court agreed, saying pp. 174-175:

"The intervening saving fund societies, the Philadelphia Saving Fund Society, the Western Saving Fund Society of Philadelphia, The Beneficial Saving Fund Society of Philadelphia and Saving Fund Society of Germantown and its Vicinity, deny the power to tax their respective incomes and support their position by reference to the Act of June 1, 1889, P. L. 420, sec. 27, as amended by Act of May 23, 1945, P. L. 910, sec. 1, 72 PS 2241. This Act provides that these parties shall annually, 'make report to the Department of Revenue setting forth the entire amount of net earnings or income received by said company . . . from all sources during the preceding year . . . ; and upon such net earnings or income, the said company . . . shall pay into the State Treasury, through the Department of Revenue, for the use of the Commonwealth, . . . three per centum upon such annual net earnings or income . . .' The city's proposed tax is 'on the net profits earned after January 1, 1949, on

* This taxing act is still in effect.

businesses, professions, or other activities conducted by such residents' (which includes corporations); the term 'net profits' is defined as 'net gain from the operation of a business . . . after provision for all costs and expenses incurred in the conduct thereof . . .' If these interveners are taxable pursuant to the amended ordinance, they will be required by the statute to pay 3% to the state and by the ordinance to pay 1¼% to the city on precisely the same report or return; a copy of one of these reports was filed with the court. The state tax is on net earnings which fact prevents the city from also taxing the net earnings. See generally, *Blauner's Inc. v. Phila.*, 330 Pa. 342, 198 A. 889 (1938); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 57 A. 2d 849 (1948); *Lawrence Twp. School District Case*, 362 Pa. 377, 67 A. 2d 372 (1949)."

* * *

*Application to National Biscuit Company Case.*

The same situation applies to this corporation, which also pays the state corporate net income tax, the only difference being that it is a manufacturing company and not a "financial business". The tax imposed by the city ordinance is therefore computed either upon the basis of the company's annual gross volume of business at 3 mills or, at its option, at 2% of its annual gross volume of business less the cost of goods and less the cost of labor—in effect, gross income. See Ordinance Sec. 3(c)(d).

Here again the tax is upon a more onerous basis than a tax upon net income, since it is based either upon gross income or upon gross receipts without any deductions whatsoever. Therefore, the city tax of

necessity directly reduces the net income subject to state tax and correspondingly the state tax itself.

*Other state taxes paid.*

Household also pays the Pennsylvania foreign franchise tax based upon capital stock. For 1951 the tax amounted to $30,014.84 and will be in excess thereof for 1952 (29a, 41a). Consumer Discount pays the capital stock tax which amounted to $6,250.00 for 1951 and will probably be greater for 1952 (30a, 41a). National Biscuit Company pays the foreign franchise tax. For 1951 the tax amounted to $56,915.14 and for 1952 was $58,308.88 (6a-7a, 14a, 16a). These taxes are all imposed under the Act of June 1, 1889 P. L. 420, §§ 20 and 21, as amended, 72 P. S. §§ 1871, 1901. Throughout the *Murray* case the Court held that a tax on income is a tax on the property producing the income and the franchise or capital stock tax is likewise a tax on such property, so that the city could not impose a net income tax thereon. A fortiori, the city cannot now impose a tax on the gross income from such property or the gross receipts from use of its capital.

(c) *Earlier decisions are distinguishable or are overruled by the Murray case.*

The city relies upon the following earlier cases: *Blauners', Inc. v. Philadelphia,* 330 Pa. 342 (1938); *Philadelphia v. Samuels,* 338 Pa. 321 (1940); and *Federal Drug Co. v. Pittsburgh,* 358 Pa. 454 (1948).

The *Blauner* case held that a city sales tax did not duplicate the state corporate net income tax because (a) the former was a tax on "transactions" whereas the latter is a tax on "property"; and (b) the sales tax was imposed upon the "purchaser or consumer" whereas the net income tax is on the "corporation re-

ceiving the income" (pp. 345-6). For the same reasons, the Court also held that the city sales tax did not invade the field preempted by the state capital stock tax.

The *Samuels* case held that the city parking lot tax did not duplicate the corporate net income tax for the reason that the parking lot tax was (a) a tax upon specific "transactions" and (b) an excise tax, whereas the state *corporate net income tax* is a "property tax". Mr. Justice Linn said, at p. 326, "This court is committed to the view that the corporate net income tax is a property tax. The tax imposed by the ordinance is an excise tax and therefore cannot be in conflict with the state act taxing property." The Court also distinguished the state capital stock tax on the same ground (p. 325).

The *Federal Drug* case held that a Pittsburgh gross receipts tax on vendors of merchandise did not encroach upon the state corporate net income tax because "this contention is disposed of by our decisions in" the *Blauner* and *Samuels* cases (p. 456). The argument that the gross receipts tax duplicated the state foreign franchise (capital stock) tax was similarly disposed of (p. 457).

It is now clear that those three cases were decided upon distinctions that are not valid in the present case:

(1) *Property Tax.*

Whether the city mercantile license tax and the state corporate net income tax, foreign franchise tax and capital stock tax are excise taxes or not, the fact remains that they are all taxes on property.

For years it has been the law that the state tax on capital stock is a tax on the property of the corporation—*Murray* decision p. 166 and cases cited.

Insofar as the issues involved in this case are concerned, the state foreign franchise tax was devised to reach the property of foreign corporations as the equivalent of the capital stock tax and stands in the same category—*Murray* decision, p. 170.

Whether the corporate net income tax be regarded as a property tax or an excise tax "the tax imposed was *upon property*"—*Murray* decision, p. 169.

It is interesting to note why this Court held that the corporate net income tax is a tax upon property. The reason advanced was that "a tax on income is a tax on the property producing the income"—*Murray* decision, p. 168, where this Court said:

> ". . . In *Kelley v. Kalodner*, 320 Pa. 180, 181 A. 598 (1935), it was decided after mature consideration of divergent views, that a tax on income is a tax on the property producing the income. It is immaterial, in construing the Sterling Act, that the income has been transferred from the corporation to its beneficially interested stockholders. Chief Justice Frazer said, in *Kelley v. Kalodner*, at pp. 186-187, '. . . . we are inevitably impelled to the conclusion that an income tax is a property tax. This result seems particularly clear in so far as a tax upon the income from real and personal property is concerned."

Applying this reasoning, it is equally true that the Philadelphia mercantile license tax is a tax on property. In the case of the saving fund societies, it is a tax upon the gross income received from investments. In the case of Household Finance Corporation and Household Consumers Discount Company, it is a tax upon the gross income received from loans of capital. In the case of the National Biscuit Company, it is a tax upon the gross receipts from the use of cap-

ital or, under the optional alternative computation, on the gross income from the use of capital. In all these cases, therefore, the city is attempting to impose a tax upon income produced by property and under the test of the *Murray* decision the city tax is likewise a tax on property.

(2) *Excise Tax.*

There are other decisions which hold that the tax on the net earnings of savings banks, the state corporate net income tax, the state foreign franchise tax and a mercantile license tax are all excise taxes.

The tax on net earnings of savings banks was held to be a franchise or excise tax in *Philadelphia Contributionship for Insurance, etc. v. Commonwealth*, 98 Pa. 48 (1881) and *The Philadelphia Saving Fund Society v. The Lehigh Coal & Navigation Co.*, 163 Pa. Super. 106 (1948).

The state corporate net income tax was held to be an excise tax in *Commonwealth v. Warner Bros.*, 345 Pa. 270 (1942), *Commonwealth v. Electrolux Corp.*, 362 Pa. 333 (1949), *Commonwealth v. Bayuk Cigars Co.*, 345 Pa. 348 (1942), *Commonwealth v. Curtis Publishing Co.*, 363 Pa. 299 (1949), to which may be added numerous decisions of the Dauphin County Court. In the *Warner Bros.* case, for example, this Court said, at pp. 271-72:

> "At the outset, it is to be observed that we are not considering an income tax, *but an excise tax for the privilege of doing business in the Commonwealth, based upon net income as returned to and ascertained by the Federal Government.* When this situation is borne in mind, the doubts as to the legality of the tax suggested by appellant disappear." (Emphasis supplied.)

The state foreign franchise tax was held to be an excise tax in *Commonwealth v. Columbia Gas & Electric Corp.*, 336 Pa. 209, 217 (1939).

A mercantile license tax imposed by city ordinance was held to be an excise or privilege tax in *Rice Drug Co. v. Pittsburgh*, 360 Pa. 240, 242 (1948) and *Blauners', Inc. v. Philadelphia*, 330 Pa. 340, 346 (1938).

Therefore, no valid distinction can be drawn between the city tax and the several state taxes mentioned on the basis that one or another is an excise tax.

(3) *Whether a Property Tax or an Excise Tax Is Here Immaterial.*

As we have seen, in 1950 this Court's decision in the *Murray* case did away with many of the fine technical distinctions in the earlier cases and finally took the position that all of these taxes are property taxes. Thus, at p. 165 the Court said:

> ". . . whether the city tax conflicts with that imposed by the state, the practical operation of the two taxes is controlling as against mere difference in terminology from time to time employed in describing taxes in various cases.

Again, at p. 169, the Court said, with particular reference to the Sterling Act:

> ". . . In construing the Act, it is immaterial that State taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls."

But whether any of these taxes are called property taxes or excise taxes makes not the slightest difference in the present case. The fundamental fact remains that the Philadelphia merchantile license tax, the state tax on net earnings of the saving fund societies and the state corporate net income tax, are

taxes on precisely the same thing, the same "subject", namely, the income of the taxpayers. Call it what you will, whether property tax or excise tax, it is impossible to call it two different things in the same case at the same time just because one tax is on the gross and the other on the net income. It is still on the income—the only difference lies in the deductions which are permissible in arriving at the tax base. The city having been defeated in the *Murray* case in its attempt to tax the net figure at the bottom of the earnings statement, it is self-evident that it may not now escape the effect of the ruling in that case by moving up to the top of the same earnings statement and taking the gross income before expenses as its tax base in order to impose a still more onerous tax.[2]

* * *

## IV. Conclusion.

For all of the reasons above set forth the ordinance of the City of Philadelphia of December 9, 1952, is invalid and appellees are not subject to the taxes and fees which it attempts to impose upon them. The decree of the Court below should therefore be affirmed.

Respectfully submitted,

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CHARLES J. BIDDLE,
*Attorneys for the Appellees.*

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2. Thus, in the *Murray* case, at p. 168, this Court applied this principle to a more remote situation than the case at bar, namely, to the City income tax on stockholders of Pennsylvania corporations as competing with the State tax on capital stock of such corporations, the Court saying:

> ". . . When the corporation pays to its stockholders income out of the property on which the capital stock tax has been paid, the city may not again tax the income in the hands of the stockholder; *and the reason is that the Sterling Act did not confer the power to tax the 'subject' that the state had taxed;* on the contrary, tax was prohibited. . . ." (Emphasis supplied.)

**Appellee's Petition for Reargument (374 Pa. 604)**

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

The majority opinion was handed down prior to and without benefit of the dissenting opinion of Justices Bell and Musmanno, which is so convincing and points up so clearly the public importance of this case that Appellee sincerely believes the Court should reconsider its decision and grant a reargument. Without repeating the cogent reasoning of the dissenting opinion, which is adopted as part of this petition, we point out the following additional considerations:

1. *The Majority Opinion necessarily amounts to a holding that the Pa. Corporate Net Income and Foreign Franchise Taxes are NOT Excise Taxes. This is contrary to the express language of the statutes and to prior decisions.*

The majority state, as the very foundation of their opinion, that the State corporate net income tax and the State foreign franchise tax "have been held, many times, to be property taxes", whereas the mercantile license tax is "an excise tax upon the privilege of transacting business" (5a).

This reasoning, necessarily amounts to a holding that the State corporate net income tax and foreign franchise tax are *not excise taxes.* Such a holding, however, flies in the teeth of the express language of the statutes and of many decisions of this Court and of the lower courts.

Section 3 of the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as last reenacted and amended, 72 P. S. 3420c, says:

"Section 3. Imposition of Tax—Every corporation shall be subject to and shall pay *for the*

*privilege of doing business* in this Commonwealth . . . a State excise tax at the rate of . . ." (Emphasis supplied.)

Section 21(b) of the Foreign Franchise Tax Act of June 1, 1889, P. L. 420, as amended, 72 P. S. 1871, reads:

"b. Every foreign corporation . . . shall be subject to and pay . . . a *franchise tax* at the rate of . . ." (Emphasis supplied.)

In *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 428 (1936), Chief Justice Kephart, speaking of the corporate net income tax, said:

". . . the present act imposes a tax on a privilege measured by net income. . . ."

In *Commonwealth v. Warner Bros.*, 345 Pa. 270, 271 (1942), Mr. Justice Schaffer said, as to the same tax:

"At the outset, it is to be observed that we are not considering an income tax, *but an excise tax for the privilege of doing business in the Commonwealth* . . ." (Emphasis supplied.)

In *Commonwealth v. Bayuk Cigars, Inc.*, 345 Pa. 348, 350, 351 (1942), Mr. Justice Linn said:

"The Corporate Net Income Tax Act . . . provides for a State excise tax payable for the privilege of doing business in this Commonwealth. . . ."

In *Commonwealth v. Electrolux Corp.*, 362 Pa. 333, 336 (1949), this Court adopted the opinion of Judge Richards, who said:

"The tax here involved is not a tax on income, but an excise tax for the privilege of doing business in the Commonwealth, measured by net

income as returned to and ascertained by the Federal government. . . ."

In *Commonwealth v. Curtis Publishing Co.*, 363 Pa. 299, 312 (1949), Chief Justice Maxey said:

". . . In most of the decisions in which the nature of the corporate net income tax was directly involved, it has been held that this tax is an excise tax upon the privilege of doing business in Pennsylvania, measured by the net income. . . ."

As to the foreign franchise tax, this Court said in *Commonwealth v. Columbia Gas & Electric Corp.* 336 Pa. 209, 217 (1939), speaking through Chief Justice Kephart:

"Did the legislature intend to change its old policy of levying a property tax and create in its stead a franchise tax upon foreign corporations? We concur with the court below in its conclusion that the tax is a franchise tax and not a property tax. The legislature in the title to the act called it a franchise tax. . . ."

Mr. Justice Allen M. Stearne, in *Commonwealth v. Ford Motor Co.*, 350 Pa. 236, 238 (1944), speaking with reference to the foreign franchise tax, said:

"It will suffice (preliminarily) to state that *the Act imposes a franchise or excise tax upon foreign corporations authorized to do business in this Commonwealth*, in substitution for the property or ad valorem tax theretofore payable by such corporations. . . ." (Emphasis supplied.)

Likewise, in *Commonwealth v. Quaker Oats Co.*, 350 Pa. 253, 258 (1944), this Court disposed of the argument that the foreign franchise tax falls upon

exempt Federal, state and municipal securities by saying:

> ". . . the inclusion of these securities in the formula producing the tax base was proper. They, themselves, were not taxed."

In the face of this array of decisions and of foregoing quotations from the statutes themselves, how can the majority now hold that the State income and foreign franchise taxes are *not* excise taxes and therefore that the City tax is different because it is an excise tax?

In this case, we have taken the position that realities control and it makes no difference whether the said State taxes are excise taxes or property taxes or both, since they are measured by income, just like the City tax. Since the majority opinion has resurrected that distinction, however, it is clear that it is untenable, unless the majority opinion be considered as overruling all of the decisions above mentioned.

2. *The Majority Opinion amounts to judicial repeal of the Sterling Act insofar as its tax limitations are concerned.*

In *Murray v. Philadelphia*, 364 Pa. 157, 169 (1950), the Court, in a unanimous opinion, said: "In construing the [Sterling] Act it is immaterial that State taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls."

Yet this is exactly the error into which the majority now falls. Because the City Ordinance describes the tax as a "mercantile license tax", the majority accepted it as such and failed to look underneath the surface to discover the exact nature of the tax. As Mr. Justice Bell has so clearly demonstrated, however, the Ordinance attempts to impose an income tax upon corporations. Insofar as financial business

and manufacturers are concerned, the Ordinance attempts *by definition* to impose the tax upon gross income. In the case of financial business the cost of securities sold and the amount of loans made are deductible, Section 1(h)(2); and in the case of a manufacturer an optional tax is permitted on the basis of gross receipts less the cost of goods and less the cost of labor, Section 3(c)(2).

If reality controls, this Court must find upon reconsideration that the City tax upon corporate income (whether gross or net) infringes upon the State corporate income tax. Everything said on this point in the majority opinion could have been said as well in the *Murray* decision if the City had *called* the tax then under review a "mercantile license tax measured by net income." The *Murray* decision held that the City could not tax the net income of corporations, so it is inconceivable how this Court can now permit the City to tax the gross income of the same corporations, bearing in mind the purpose of the Sterling Act to protect the State's sources of revenue.

To illustrate:

A corporation has an earning statement substantially as follows:

| | |
|---|---|
| (a) Gross receipts from all sources | $1,000,000. |
| (b) Less cost of goods sold, securities, loans, etc. | 500,000. |
| (c) Gross income | 500,000. |
| (d) Less other expenses | 200,000. |
| (e) Net income | $ 300,000. |

The State income tax is measured by (e) net income $300,000. The *Murray* case said that the City could not tax item (e) under the Sterling Act because

it would tap the State's sources of revenue. Yet the majority decision now says that the City may tax (c) gross income $500,000, which is a more onerous tax base than (e). If reality controls, this conclusion must be erroneous.

To all intents and purposes the tax limitation in the Sterling Act would, under the majority opinion, be a dead letter. Any tax apparently could be imposed by a municipality, under the Sterling Act or Tax Anything Act of 1947, by merely calling it a mercantile license tax, and excise tax, or anything else but a property tax. This means, of course, that the underlying purpose of the Sterling Act has been completely defeated and the Court has repealed the statute.

The result will be that the State's revenues will be seriously impaired. While this case was being litigated, the City officials repeatedly said that the City tax would produce about $12,000,000 a year from corporations. Since this is deductible on the State income tax returns, the State will lose at the rate of 5% on this amount or about $600,000 per annum. Similar statutes, if passed by the other municipalities and other governments under the Act of 1947 will entrench upon the State's revenues in even greater amounts. The Court will take judicial notice of the critical financial condition of the Commonwealth at the present time and the great difficulty which the legislature is having in enacting new revenue measures to meet the need. The record in this case also pointed out, most clearly, that the principal source of the State's Revenues at the present time consists of taxes upon corporations. (Supplemental Record 132a-134a, and see excerpt from the report of Governor Fine's Bipartisan Committee, printed as an appendix to Appellee's brief at p. 63.) The express purpose of the

Sterling Act was to preserve such revenues for the Commonwealth.

As matters presently stand, therefore, if the majority opinion holds, the tax limitations of the Sterling Act have been repealed judicially:

> 3. *The majority decision should be reconsidered because it unsettles the law of taxation in the Commonwealth and jeopardizes the collection of State taxes.*

The denial by the majority in this case that the State corporate net income tax and foreign franchise tax are excise taxes will, if allowed to prevail, seriously jeopardize the administration of these taxes in connection with multi-state corporations. In numerous cases, some of which are specifically mentioned above, this Court has been able to sustain the various State levies, and the Commonwealth has been able to reach out-of-state assets and income, solely on the ground that these taxes *are* excise taxes for the privilege of doing business in Pennsylvania, and are *not* property taxes.

Thus the constitutionality of the foreign franchise tax was sustainable in the *Columbia Gas* case, *supra,* only because the Court found that it was an excise tax. Likewise, the formula for bringing the value of capital stock located abroad into the Commonwealth for purposes of taxation was upheld, in the *Ford Motor* case, *supra,* only because it was held to be a franchise tax. And in the *Quaker Oats* case, *supra,* this Court could reach the result that exempt Federal, State and municipal securities held outside the State by the foreign corporation could be included in the tax base only by virtue of the fact that it found the foreign franchise tax to be an excise tax and not a property tax.

Similarly, the constitutionality of the corporate net income tax as applied to foreign corporations doing

business in Pennsylvania and the allocation fractions were sustained, in the *Turco Paint* case, *supra,* upon the ground that the corporate net income tax is an excise tax and therefore the allocation fractions operated as a fair measure of the value of the privilege exercised in Pennsylvania. In the *Warner Bros.* case, *supra,* this Court upheld the use of Federal net income as the tax base, particularly the Federal limitation of $2,000 on capital losses, on the ground that the corporate net income tax is an excise tax. The decision could not have been sustained if it were a property tax.

The authority of these and other cases that could be cited will be seriously open to question, both in this Court *and in the Supreme Court of the United States,* if the present opinion of the majority should stand and conclusively establish that the foreign franchise tax and the corporate net income tax are *not* excise taxes.

Indeed, the legislature was so convinced that the corporate net income tax is an excise tax and therefore could not be imposed upon foreign corporations engaged exclusively in interstate commerce under *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1950) that, in order to tax corporations doing purely interstate commerce business in Pennsylvania, it went to the trouble of imposing an entirely new corporate income tax which it specifically designated as a property tax.[1] Obviously, since the corporate net income tax of 1935 was called an excise tax and had been so held by this Court, it could not be applied to business

1. Act of August 24, 1951, P. L. 1417, as last reenacted and amended, 72 P. S. 3420 n-1. Section 3 of this Act (unlike the corresponding section of the Corporate Net Income Tax Act quoted above at p. 2) reads:

"Section 3. Imposition of Tax—Every corporation carrying on activities in this Commonwealth . . . shall pay *a State property tax* on net income derived from sources within this Commonwealth. . . . (Emphasis supplied.)

which was exclusively interstate commerce for it would then have been a charge for the privilege of carrying on interstate commerce which is prohibited by the Federal constitution. Therefore, to avoid this the legislature imposed a new corporate net income tax in 1951 applicable to foreign corporations, which it designated "a State property tax on net income derived from sources in this Commonwealth."

We submit that the whole intent of the decision in the *Murray* case was to abolish the type of technical distinction concerning nomenclature on which the opinion of the majority in this case is based. We further submit that the reason it was necessary to extinguish those distinctions was because, as time progressed, it became apparent that the distinctions were without substance and created an ambiguity in the Pennsylvania law of taxation which could lead only to confusion among the taxpayers of the Commonwealth. The present opinion at one and the same time revives the use of technical distinctions of nomenclature in deciding substantive questions concerning taxation and reinstates the confusion which previously existed and which had been cleared up effectively by the *Murray* case.

The method used by the majority in this case in order to arrive at its conclusion, i.e., the determination of substantive questions of State taxation according to their name rather than their substance, is an open invitation to the State legislature and the governing bodies of all its municipal subdivisions, to devise, with ever increasing ingenuity, novel levies in an effort to circumvent established constitutional principles limiting the power to tax. An immediate example of the type of tax which was invited by the majority opinion before the ink was scarcely dry upon it, is the proposal, now before the legislature at Harrisburg, which ap-

pears to be that if a tax is not levied upon income as such, but rather upon the income tax payments made to the Federal government the levy will be valid. This is a patent effort to justify a graduated income tax and thus circumvent the uniformity provisions of the Pennsylvania constitution and decision of this Court in *Kelley v. Kalodner*, 320 Pa. 180 (1935). We fear that the majority opinion will give great comfort to the sponsors of such proposals.

The fact that both Judges of the Common Pleas Court of Philadelphia and all of the Judges of the Common Pleas Court of Erie County, in their similar decision in *In Re Erie Gross Receipts Tax*, 73 D. & C. 313 (1950), and Justices Bell and Musmanno of this Court, all strongly believe that a local gross receipts tax cannot be imposed upon manufacturers subject to the State corporate net income tax and the franchise or capital stock tax, is sufficient to show that the majority opinion should be carefully reconsidered.

4. *The license fee point should also be reconsidered.*

On the basis of the reasoning of Justice Allen M. Stearne in his separate opinion dissenting in part, it is respectfully submitted that this Court should likewise permit a reargument of the licensee fee point as applied to this petitioner. The majority opinion concedes that the bakeries run by Appellee are carefully supervised and regulated by the Department of Agriculture. Nor does it deny that the license fees are imposed upon a graduated basis ranging from $5 to bakeries using less than 100 barrels of flour per week to $20 for bakeries using 200 barrels or more, and since this is imposed for each bakery operated by Appellee, its total license fees amounted to $180 last year.

The majority opinion dismissed this point lightly with the statement that "it is difficult to believe that

flat charges ranging from $5 to $20 per annum could have been legislatively intended to cover the cost of regulating the bakery industry" (p. 14a). This statement is palpably incorrect, because the license fees are *not flat charges* but are graduated similar to those in the *Pittsburg Milk Company* case.

As Mr. Justice Allen M. Stearne pointed out, "it is clear that $23,000 [the amount of such fees collected per annum recently] would pay for a great deal of regulation"; and we respectfully submit that he was correct in urging that this Court should not introduce "further uncertainty into this field of law by reaching a different result from that in the *Pittsburgh Milk* case, *supra*, by recognizing *a difference in degree of graduation* of the tax" (21a) (emphasis supplied).

Moreover, it is clear from the majority statement quoted above that they overlooked the actual fact that the graduated bakery fees were actually and historically fixed so as to pay for the cost of regulation. In Appellee's Supplemental Record at page 128a there is a copy of a letter from Mr. W. S. Hagar, who has been Deputy Secretary of Agriculture for many years and occupied this position at the time the fees were established, in which he said, in part:

> "When the present Bakery Law was being drafted in 1933, this Department estimated what it would cost to inspect the bakeries and to administer the law. It was realized that the cost would vary according to the size of the plant and the volume of the business. Upon this premise, a graduated license was adopted according to the volume of business computed upon the amount of flour or flour substitutes used.
>
> "A single registration fee was considered but was abandoned, as it was felt that the industry

should pay a license sufficient to cover the complete enforcement of the law and is one of the few industries where such a license is required to manufacture food products in Pennsylvania."

For the reasons stated above, it is respectfully requested that a reargument be granted Appellee by the Court.

JOHN AMES BALLARD,
LESLIE M. SWOPE,
CHARLES J. BIDDLE,
*Attorneys for National Biscuit Company, Petitioner.*

## DEFENDANT'S EXHIBIT NO. 2.

**Appeal and Specification of Objections, Printed as Item II at Page 3a, Supra.**

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## DEFENDANT'S EXHIBIT NO. 3.

**Bond on Appeal From Settlement of An Account by the Secretary of Revenue and the Auditor General Filed May 18, 1954 (Not Printed).**

## IV.

## RELEVANT EXCERPTS FROM TAXING STATUTE.

**Sections 20 and 21 of the Act of June 1, 1889 P. L. 420, 72 P. S. §§ 1871, 1901 and 1902, as amended to 1952:**

**Section 21, as last amended by the Act of May 29, 1951, P. L. 462:**

"Section 21. * * * (b) Every foreign corporation, * * * from which a report is required under the twentieth section hereof, shall be subject to and pay * * * a franchise tax at the rate of five mills upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in the twentieth section of this act, and shall then be divided into three equal parts.

(1) Of one third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the value of the taxpayer's tangible property not actually and exclusively used in manufacturing, situated within the Commonwealth, and whose denominator is the value of all the taxpayer's tangible property wherever situated.

(2) Of another third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the expenditures of the taxpayer for wages, salaries, commissions, or other compensation to its employes not exclusively engaged in manufacturing in this Commonwealth and assignable

to this Commonwealth as hereinafter provided, and whose denominator is the total expenditures of the taxpayer for wages, salaries, commissions, or other compensation to all its employes.

(3) Of the remaining third, such portion shall be attributed to business carried on within the Commonwealth, as shall be found by multiplying said third by a fraction, whose numerator is the amount of the taxpayer's gross receipts from business not strictly incident or appurtenant to manufacturing in this Commonwealth assignable to this Commonwealth as hereinafter provided, and whose denominator is the amount of the taxpayer's gross receipts from all its business.

The sum of the amounts, determined in accordance with the foregoing three rules, shall be the taxable value. * * *

The amount assignable to this Commonwealth of expenditures of the taxpayers for wages, salaries, commissions, or other compensation to its employes, shall be such expenditures for the taxable year as represent the wages, salaries, commissions, or other compensation of employes not chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth.

The amount of the taxpayer's gross receipts from business assignable to this Commonwealth shall be, (1) the amount of its gross receipts for the taxable year, except those negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business maintained by the taxpayer outside the Commonwealth, and except rents and royalties, and interest and dividends, (2) rentals or royalties from property situated or from the use of patents within this Commonwealth, and (3) dividends and interest, except

such dividends and interest attributable to the business conducted on premises maintained by the taxpayer outside the Commonwealth." * * *

* * *

"Notwithstanding the foregoing provisions of this subsection (b), the franchise tax of five mills imposed by subsection (b) on reports filed for the calendar years * * * one thousand nine hundred fifty-two, * * * shall apply to the taxation of corporations, limited partnerships and joint-stock associations organized for manufacturing purposes, excepting companies engaged in the distilling of liquors, without excluding from the numerators of the applicable fractions tangible property actually and exclusively used in manufacturing, compensation of employes exclusively engaged in manufacturing, and gross receipts from business strictly incident or appurtenant to manufacturing."

**Sec. 20, as last amended by the Act of May 16, 1945, P. L. 606:**

"Section 20. That hereafter, * * * it shall be the duty of every * * * corporation, * * * now or hereafter incorporated or organized by or under the law of any other State * * *, and doing business in and liable to taxation within this Commonwealth, * * * to make annually on or before the fifteenth day of March, for the calendar year next preceding, a report in writing to the Department of Revenue on a form or forms to be prescribed and furnished by it, setting forth, in addition to any other information required by the Department of Revenue:

First. The amount of its capital stock at the close of the year for which report is made, together with the highest selling price per share, and the average selling price thereof during said year.

Second. Its debt account.

Third. Its income account, together with the disposition of any net income, and its profit and loss statement.

Fourth. Its general balance sheet.

Fifth. Its real estate and tangible personal property, if any, owned and permanently located outside of the Commonwealth, and value of the same; and the value of the property, if any, exempt from taxation.

Sixth. A valuation and appraisal, in the manner hereinafter provided, of the capital stock of the said corporation, * * * at its actual value in cash as it existed at the close of the year for which the report is made.

* * *

The affidavit of two of the officers of such corporation * * * shall state, in addition to any other averments required by the department, that, with fidelity and according to the best of their knowledge and belief, the affiants have estimated, valued and appraised, as shown in said report, the capital stock of the said corporation at its actual value in cash as it existed at the close of the year for which report is made; taking into consideration, first, the average which said stock sold for during the year; and second, the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dvidends, expended in betterments, or carried into the surplus or sinking fund; and third, the actual value indicated or measured by consideration of the intrinsic value of its tangible property and assets, and of the value of its good will and franchises and privileges, as indicated by the material results of their exercise, taking also into consideration the amount of its indebtedness, * * *"

## V.

## COMMONWEALTH'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Commonwealth of Pennsylvania by George W. Keitel, Deputy Attorney General, counsel for the Commonwealth, respectfully requests your Honorable Court to make the following Findings of Fact and Conclusions of Law:

### I. Findings of Fact.

The Commonwealth respectfully requests the Court to make as Findings of Fact paragraphs 1, 2, 4, 5, 8, 10, 11(a), 12, 14, 15, 16 and 17 in the Stipulation of Facts agreed to between counsel for the respective parties in the above-entitled case.

### II. Conclusions of Law.

1. The Pennsylvania Franchise Tax imposed on foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184, and further amendatory acts, is an excise tax levied on the privilege of doing business in Pennsylvania.

2. The Franchise Tax settlement against defendant for the year 1952 was made by the Departments of Revenue and of the Auditor General pursuant to the express provisions of said Act of 1935 and its amendments.

3. The three statutory allocation fractions of tangible property, wages and gross receipts provided for in the Act of 1935 and its amendments, when applied to the value of defendant's capital stock, determine the value of defendant's franchise or privilege of

doing business within Pennsylvania for the purpose of the imposition of the Franchise Tax.

4. The Franchise Tax, as thus measured by the statutory allocation fractions applied to the value of defendant's capital stock, does not impose an unconstitutional tax or burden upon the United States securities or any other property owned by the defendant.

5. The Franchise Tax settlement made against defendant for the year 1952 does not violate any provisions of the Constitution of the United States or the Constitution of Pennsylvania.

6. In all cases arising between the Commonwealth and its taxpayers, the Franchise Tax has been construed as an excise tax on the privilege of doing business in Pennsylvania, and the nature of the Franchise Tax on said privilege has not been altered by pronouncements in cases construing the power of local political subdivisions to impose taxes on the same privilege, transaction, subject, occupation or personal property as are taxed by the Commonwealth.

7. The decision in this case that the Franchise Tax is an excise tax upon the privilege of doing business in Pennsylvania does not violate the due process clause of the Constitution of the United States, because of any ruling pronouncement or dictum to the contrary made in cases involving the power of local political subdivisions to impose taxes.

8. The facts averred in paragraphs 3 and 6 of the Stipulation of Facts are excluded from the evidence considered in this case, because they are irrelevant and immaterial to the issues presented in this case.

9. The facts averred in paragraph 9 of the Stipulation of Facts are excluded from the evidence in this case, because they are irrelevant and immaterial.

10. The facts averred in paragraph 11(b) of the Stipulation of Facts are excluded from the evidence considered in this case, because they are irrelevant and immaterial.

11. The facts averred in paragraph 13 of the Stipulation of Facts are excluded from the evidence in this case, because they are irrelevant and immaterial.

12. The defendant's appeal is dismissed, the settlement of Franchise Tax against the defendant is sustained, and judgment is directed to be entered in favor of the Commonwealth and against the defendant in the amount of Fifty-Eight Thousand, Three Hundred Twenty-One and 60/100 Dollars ($58,321.60); and the said tax of Fifty-Eight Thousand, Three Hundred Twenty-One and 60/100 Dollars ($58,321.60), having been paid by the defendant, the said judgment shall be marked satisfied by the Prothonotary upon payment by the defendant of the costs in the case.

Respectfully submitted,

GEORGE W. KEITEL,
Deputy Attorney General,
*Counsel for Commonwealth of Pennsylvania.*

## VI.
## DEFENDANT'S REQUESTS FOR FINDINGS OF FACT.

National Biscuit Company, Defendant herein, by its attorneys, Leslie M. Swope and Roy J. Keefer, requests your Honorable Court to make the following Findings of Fact:

1. Defendant was incorporated under the laws of the State of New Jersey on February 3, 1898. It registered and qualified to do business in Pennsylvania on March 28, 1899 and re-registered on August 21, 1933, under the Business Corporation Law of 1933 to engage in Pennsylvania in the business of "manufacture and sale of bakery products."

(Commonwealth's Exhibit 7, hereinafter in these Requests referred to as "Stipulation of Facts", paragraph 1.)

2. Defendant's principal office and address are at 449 West Fourteenth Street, New York, New York; and its registered address in Pennsylvania is Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, c/o C. T. Corporation System.

(Stipulation of Facts, paragraph 2.)

3. During the year 1952, defendant had 365 places of business, 21 in Pennsylvania and 344 outside of Pennsylvania; its President, Secretary and Treasurer were located and performed their duties at 449 West Fourteenth Street, New York, New York; no Assistant Treasurer or Assistant Secretary resided or performed his duties in Pennsylvania; the annual meeting of its stockholders was held at 1 Exchange Place, Jersey

City, New Jersey; and its directors met, its principal bank account was maintained, and its bonds, securities, etc. were kept in New York City.

(Stipulation of Facts, paragraph 3.)

4. During the year 1952, defendant was engaged within and without Pennsylvania in the manufacture and sale of bakery products; and it held, owned and controlled at its principal office in New York City its investments in United States securities and in shares of stock of subsidiary companies operating in foreign countries. These investments were made, all activities in connection therewith were carried on, and all income therefrom was received, by that office.

(Stipulation of Facts, paragraph 4.)

5. For the purposes of this case the business of the subsidiary companies was independent of and unrelated to the business conducted by defendant in the United States, including Pennsylvania.

(Stipulation of Facts, paragraph 5.)

6. Defendant, at its principal office at 449 West Fourteenth Street, New York, New York, performed administrative and executive functions involving management and control which included production, expenditures, investments, purchasing, pricing, advertising, sales programming, credit, personnel, compensation, accounting, taxes and legal service.

(Stipulation of Facts, paragraph 6.)

7. The tax involved in the present proceeding is known as the "Franchise Tax", which is imposed on foreign corporations under the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto

being the Act of May 29, 1951, P. L. 462, 72 Purdon's Statutes, Sections 1871 and 1901—these acts to be referred to hereinafter as the Act of 1935 and Amendments.

(Stipulation of Facts, paragraph 7.)

8. Using a report form furnished to it by the Department of Revenue, defendant duly completed and filed with that Department its "Franchise Tax" report for the year 1952.

(Commonwealth's Exhibit 1; Notes of Testimony, hereinafter in these Requests referred to as "N. T.", page 5; Stipulation of Facts, par. 8.)

9. As shown by said report and by the corresponding report for 1951, defendant owned *inter alia* the following as of January 1, 1952 and as of December 31, 1952:

| | Jan. 1, 1952 | Dec. 31, 1952 |
|---|---|---|
| Investment in United States securities | $ 19,108,500.00 | $ 26,300,000.00 |
| Investment in shares of stocks of subsidiary companies operating in foreign countries (More than fifty per cent owned | 7,883,161.00 | 8,823,465.00 |
| Investment in tangible property in Pennsylvania | 7,006,593.00 | 6,333,877.00 |
| Cash—Demand deposits | 17,377,854.00 | 13,620,326.00 |
| Accounts Receivable | 12,520,993.00 | 10,229,670.00 |
| Total Assets | 185,986,841.00 | 194,941,349.00 |

(Stipulation of Facts, paragraph 9; Commonwealth's Exhibit 1.)

10. On the basis of said report and pursuant to the purported provisions of the Act of 1935 and Amendments, the Department of Revenue, on October 28, 1953, settled and, on November 5, 1953, the Department of the Auditor General approved settlement of "Franchise Tax" against defendant for the year 1952.

(Commonwealth's Exhibit 1; Stipulation of Facts, paragraph 10 and Exhibit A attached thereto.)

11. Said settlement was made by the taxing departments upon the theory that the tax imposed by the Act of 1935 and Amendments was an excise tax on foreign corporations for the privilege of doing business in Pennsylvania:

(a) In said settlement, the taxable value is determined by applying the statutory allocation fractions of tangible property, wages and gross receipts to defendant's capital stock valuation of $160,000,000 as determined by the taxing departments and the resulting taxable value is $11,664,320, to which the tax rate of five mills is applied.

(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets less its investment in stocks of foreign subsidiaries times its capital stock valuation $\left(\frac{6,670,235}{194,941,349 - 8,823,465} \times\right.$ $160,000,000), the resulting taxable value would be $5,734,202, which times the tax rate of five mills produces tax of $28,671.01. It is agreed that the method

used in settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, was the ratio of average tangible property in Pennsylvania over *total* assets times the *entire* capital stock value. The difference between this formula and that set forth above as applicable to defendant under the property tax theory for the year 1952 is caused by the fact, as disclosed in paragraph 12 of the Stipulation of Facts, that defendant's investments in stocks of subsidiaries and the income derived therefrom were excluded in the appraisal of its capital stock at $160,000,000, it being the intention of the parties hereto that said exclusion of stocks of subsidiaries and the income therefrom in said appraisal is not at issue for the purposes of this case.

(Stipulation of Facts, paragraph 11, as amended.)

12. In appraising defendant's entire capital stock at a valuation of $160,000,000, the taxing departments included all of the defendant's tangible and intangible assets as listed in the Balance Sheet of its "Franchise Tax" report for 1952, except its investment in shares of stock of subsidiary companies operating in foreign countries. This investment and the income derived therefrom were excluded by the taxing departments in the appraisal of defendant's capital stock.

(Stipulation of Facts, paragraph 12.)

13. In settling capital stock tax (construed by the Pennsylvania courts to be a property tax) against Pennsylvania corporations for the year 1952, the taxing

departments treated as exempt or non-taxable assets, investments of such corporations in:

(a) Securities of the United States, its agencies and instrumentalities;

(b) Commonwealth of Pennsylvania bonds;

(c) Shares of foreign corporations more than fifty percent owned whose capital stock represented property and assets located or having a situs outside of Pennsylvania;

(d) Shares of other Pennsylvania corporations liable to or relieved from payments of Capital Stock Tax to Pennsylvania;

(e) Shares of banks and banks and trust companies paying tax on their shares to Pennsylvania; and

(f) Tangible property located outside of Pennsylvania;

whereas such investments of foreign corporations were not accorded similar treatment by the taxing departments in the settlements of the so-called "Franchise Tax" made against foreign corporations, including the defendant, for the year 1952. In the case of Pennsylvania corporations, the tax formula is the tax rate times the taxable value which is obtained by applying the ratio of non-exempt or taxable assets to total assets times the capital stock valuation. In the case of foreign corporations, the tax formula is the tax rate times the taxable value which represents the sum of the results obtained by applying each of the three statutory allocation fractions, where applicable as provided in the 1935 Act and amendatory Acts, to one-third of the capital stock valuation.

(Stipulation of Facts, paragraph 13.)

14. On January 26, 1954, the defendant filed with the Department of Revenue its Petition for Resettlement of the "Franchise Tax" settled against it for the year 1952, and, on February 11, 1954, the Departments of Revenue and Auditor General refused the prayer of said Petition for Resettlement.

(Commonwealth's Exhibits 2 and 3; N. T., page 5; Stipulation of Facts, paragraph 14.)

15. On March 11, 1954, defendant filed with the Board of Finance and Revenue its Petition for Review of the action of the Departments of Revenue and Auditor General in refusing its Petition for Resettlement and, on March 17, 1954, the said Board refused the prayer of its Petition for Review.

(Commonwealth's Exhibits 4 and 5; N. T., pp. 5 and 6; Stipulation of Facts, paragraph 15.)

16. On April 14, 1954, defendant duly filed with the Prothonotary of Dauphin County its Appeal and Specification of Objections to said settlement and to the refusal of its Petition for Review by the Board of Finance and Revenue; and on May 18, 1954, defendant duly filed an appeal bond as required by law.

(Stipulation of Facts, paragraph 16; Defendant's Exhibits 2 and 3.)

17. Defendant made payment in full of the "Franchise Tax" settled against it for the year 1952, as follows:

| | |
|---|---|
| By check—March 5, 1953 | $58,308.88 |
| By transfer of 1951 "Franchise Tax" credit | 12.72 |
| Total | $58,321.60 |

(Stipulation of Facts, paragraph 17; Commonwealth's Exhibit 6; N. T., page 6.)

18. It is further stipulated and agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that the entire record in the case of *National Biscuit Company v. Philadelphia,* 374 Pa. 604 (National Biscuit Company, one of the appellees in this case is the same as the defendant in the present proceeding) shall be incorporated in the record of the present proceeding by reference as evidence of the facts and issues in that proceeding, without the necessity of copying the same in the transcript of the record in the present proceeding; and that any part or parts thereof may be quoted in the argument and briefs by either party hereto at any stage, including any appellate stage, of this proceeding, as though fully appearing in the record in the present proceeding, subject to the right of the adverse parties to object to the relevancy or materiality thereof. For the purposes of this paragraph, it is further agreed that the said record shall include, but not be limited to, Appellants' printed Record (Nos. 214, 215 and 216 January Term, 1953), Appellees' printed Supplemental Record (Nos. 214, 215 and 216 January Term, 1953), the Philadelphia Ordinance and the Sterling Act (Act of August 5, 1932, Special Session 1932, P. L. 45) there involved, Appellee's Petition for Reargument (No. 214 January Term, 1953), the opinions of the several justices of the Supreme Court of Pennsylvania, and also, Appellants' Brief and Supplemental Brief (Nos. 214, 215 and 216 January Term, 1953), and Appellees' Brief and Reply Brief (Nos. 214, 215 and 216 January Term, 1953).

(Stipulation of Facts, paragraph 19.)

19. The parties hereto further agree that the court, in considering the issues raised in the present proceeding, may examine the printed Briefs and Records and statutes or ordinances in any case decided by the courts of this Commonwealth involving the nature of the Franchise Tax imposed by the Act of 1935 and Amendments and of the Capital Stock Tax previously imposed on foreign corporations.

(Stipulation of Facts, paragraph 19.)

20. On December 9, 1952 the City of Philadelphia enacted an ordinance imposing an annual mercantile license tax for the year 1953 and annually thereafter upon, inter alia, every manufacturing corporation desiring to engage in or to continue to engage in business in Philadelphia, at the rate of three mills on each dollar of the annual gross volume of business, as defined in the ordinance, transacted by such corporation (or in the alternative at the optional rate of two percent of the annual gross volume of business transacted by such company less the cost of goods and less the cost of labor), and required every such company to procure a mercantile license and pay a license fee of $3.00 for each place of business in the city.

(Defendant's Exhibit No. 1; Ordinance (§§ 2, 3).)

21. Said ordinance was enacted under the purported authority of an enabling act known as the "Sterling Act" which gave the city authority to levy taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of the city, except that city council shall not have authority to levy any tax on a privilege, transaction, subject, or occupation, or on personal property "which is now or may hereafter become subject to a State tax or license fee".

(Act of August 5, 1932, Ex. Sess., P. L. 45, 53 P. S. 4613; *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610.)

22. The defendant, National Biscuit Company, which was then and still is doing business in Philadelphia, filed a complaint in equity, in the Common Pleas Court of Philadelphia County, to enjoin the City of Philadelphia from levying the said tax upon the Company for the reason, among others, that the Company was subject to and required to pay to the Commonwealth of Pennsylvania for the privilege of doing business therein, a franchise tax under §§ 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, 72 P. S. 1871-1901, and that consequently the city's mercantile license fee and tax levy, as applied to National Biscuit Company, was not authorized by the Sterling Act but, on the contrary, was prohibited by such statute because, inter alia, complainant was subject to and paid the State Franchise Tax above mentioned.

(Defendant's Exhibit No. 1—Record 6(a), 8(a), *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610-611.)

23. In its briefs and arguments before the Supreme Court of Pennsylvania, National Biscuit Company strenuously argued that, being already subject to a State excise tax for the privilege of doing business known as the Foreign Franchise Tax, it could not, under the Sterling Act, be again subjected to an excise tax for the privilege of doing business by the City of Philadelphia.

(Defendant's Exhibit No. 1—Brief for Appellees, pages 30-31; Petition for Reargument, pages 1-3, 6-7.)

24. The Supreme Court of Pennsylvania rejected the contention of National Biscuit Company on the ground that while the Philadelphia mercantile license tax is an excise tax, the State Franchise Tax on foreign corporations is in reality a property tax on the property of the corporation.

(*National Biscuit Co. v. Philadelphia*, 374 Pa. 605, 612-614.)

25. In the event that the "Franchise Tax" settlement against defendant for the year 1952 is sustained, it is agreed that judgment should be entered in favor of the Commonwealth and against defendant in the amount of $58,321.60 which, having been duly paid, should be marked satisfied.

(Stipulation of Facts, paragraph 18, as amended.)

26. If the Court finally determines that Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and subsequent amendatory acts (the last relevant amendatory act being the Act of May 29, 1951, P. L. 462) imposes a property tax on defendant which is determinable on the basis of the computation in Defendant's Request for Finding of Fact No. 11(b), it is agreed that judgment should be entered in favor of the Commonwealth and against the defendant in the amount of $28,671.01 which, having been paid, should be marked satisfied and a credit of $29,650.59, representing tax overpayment by defendant should be directed to be entered in favor of defendant on the proper books and records of the Departments of Revenue and Auditor General.

(Stipulation of Facts, paragraph 18, as amended.)

27. In the event that the Court finally determines this case on any basis other than those set forth in Defendant's Requests for Findings of Fact Nos. 25 and 26, the parties agree that the Record in the present case shall be reopened in order to submit to the Court such additional evidence as may be necessary to enable it to enter judgment.

(Stipulation of Facts, paragraph 18, as amended.)

28. If the settlement in controversy should be corrected only to the extent of excluding, from the computation, defendant's investment in U. S. securities, the tax should be resettled in the amount of $50,080.27 computed as follows: $26,300,000 (total U. S. securities) over $186,117,884 (total assets less foreign subsidiaries) times $160,000,000 equals $22,609,331 (exempt capital stock value of U. S. securities. Subtracting the last figure from $160,000,000 (value of capital stock per settlement) results in adjusted capital stock value of $137,390,669, to which should be applied the composite allocation fraction or percentage shown in the settlement of .072902, thus producing a taxable value of $10,016,054.55 and applying thereto the tax rate of five mills results in a tax of $50,080.27, and a reduction in tax of $8,241.33, attributable to the exemption for investments in U. S. securities.

Respectfully submitted,

/s/ LESLIE M. SWOPE,
DRINKER, BIDDLE AND REATH,
/s/ ROY J. KEEFER,
HULL, LEIBY AND METZGER,
*Counsel for Defendant.*

## VII.

## DEFENDANT'S REQUESTS FOR CONCLUSIONS OF LAW.

National Biscuit Company, Defendant herein, by its attorneys, Leslie M. Swope and Roy J. Keefer, requests your Honorable Court to make and adopt the following Conclusions of Law as applicable to the determination of this cause:

1. The tax imposed on foreign corporations by the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, hereinafter referred to as the Act of 1935 and Amendments, is a tax on defendant's capital stock and is by its incidence a property tax.

2. The "Franchise Tax" settlement against defendant for the year 1952 was made by the Departments of Revenue and Auditor General pursuant to the purported provisions of the Act of 1935 and Amendments.

3. All of defendant's intangible assets, including its investments in stocks of subsidiary companies and in United States securities, are beyond the power and jurisdiction of Pennsylvania to levy a property tax thereon.

4. The statutory allocation fractions of tangible property, wages and gross receipts as provided for in the Act of 1935 and Amendments, when applied to defendant's entire capital stock value, do not determine the value of its property located in Pennsylvania. See *Com. v. Columbia Gas and Electric Corporation*, 336 Pa. 209, 221.

5. The "Franchise Tax" settlement made against defendant for the year 1952 and the Act of 1935 and Amendments, if authorizing the said settlement, violate the due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that property tax is imposed therein on defendant's intangible and tangible property or assets located or having a situs outside of the Commonwealth of Pennsylvania.

6. The "Franchise Tax" settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation, particularly of United States securities and tangible property located outside of Pennsylvania, granted to domestic corporations in tax settlements on their capital stock, are denied to defendant, a foreign corporation.

7. The "Franchise Tax" settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that tax is imposed in part upon defendant's investment in United States securities.

8. The tax imposed on foreign corporations, including the defendant, by the Act of 1935 and Amendments is the "equivalent" of a property tax.

9. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the "equiv-

alent" of a property tax, the "Franchise Tax" settled against defendant for the year 1952 violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that the incidence of the tax is in part upon defendant's investment in United States securities.

10. The "Franchise Tax" settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C., Section 742, which generally exempts interest-bearing obligations of the United States from state and local taxation.

11. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the "equivalent" of a property tax, the "Franchise Tax" settled against defendant for the year 1952 violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C., Section 742, which generally exempts interest bearing obligations of the United States from state and local taxation, in that the incidence of the tax is in part upon defendant's investment in United States securities.

12. To sustain the Act of 1935 and Amendments and the tax settlement made against defendant thereunder for the year 1952 as imposing a franchise or excise tax on defendant for the privilege of doing business in Pennsylvania and not a property tax, would be inconsistent with the decision of the Supreme Court of Pennsylvania in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in that case is the same as the defendant in the present proceeding) and with similar prior decisions of that Court, and would, in such event and under such circumstances, violate the Pennsylvania and Federal Constitutions as follows:

(a) The due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that such decision would be inconsistent with the above mentioned prior decision rendered against the defendant, would be arbitrary and unreasonable, and would deny defendant a reasonable adjudication of its rights.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation granted to domestic corporations in tax settlements on their capital stock would be denied to defendant, a foreign corporation, on the basis of semantics and of distinctions having no substance or reality.

13. Defendant's tax liability for the year 1952 under the Act of 1935 and Amendments, should be determined by eliminating in the tax computation any tax liability on defendant's tangible property located outside of Pennsylvania, its investments in United States securities and its other intangible assets.

14. Judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Twenty-eight Thousand Six Hundred Seventy-one Dollars and one cent ($28,671.01), computed as set forth in defendant's Request for Findings of Fact No. 26, which, having been overpaid, should be marked satisfied, and said judgment should order a credit of Twenty-nine Thousand Six Hundred Fifty Dollars and Fifty-nine cents ($29,650.59) to be entered in favor of defendant on the proper books and rec-

ords of the Department of Revenue and the Department of the Auditor General.

15. If the tax settlement should be corrected only to the extent of excluding from the computation, defendant's investment in United States securities, judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Fifty Thousand Eighty Dollars and Twenty-seven Cents ($50,080.27), computed as set forth in defendant's Request for Finding of Fact No. 28, which, having been paid, should be marked satisfied, and said judgment should order a credit of Eight Thousand Two Hundred Forty-one Dollars and Thirty-three Cents ($8,241.33) to be entered in favor of the defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General.

16. The Board of Finance and Revenue erred in making the following decision:

"And now, to wit, March 17, 1954.

"This petition for review is refused and the action taken by the Department of Revenue, approved by the Department of the Auditor General, is hereby sustained."

17. The appeal is sustained at the cost of the Commonwealth.

Respectfully submitted,

/s/ LESLIE M. SWOPE,
DRINKER, BIDDLE & REATH,
/s/ ROY J. KEEFER,
HULL, LEIBY AND METZGER,
*Counsel for the Defendant.*

## VIII.

## OPINION FILED WITH JUDGMENT NISI.

By THE COURT:

The defendant filed its franchise tax report for the year 1952. In due time, the tax was settled in the amount of $58,321.60. Petitions for resettlement and for review were filed, and refused in each instance. This appeal followed. The parties agreed to a trial without a jury. A hearing was held, at which time testimony was received, including a stipulation of facts. The case has been argued and is now ripe for decision.

We adopt as findings of fact the first seventeen paragraphs of the stipulation of the parties. They are too extensive to be included herein, so we incorporate them by way of reference. The Commonwealth has objected to paragraphs 3, 6, 9, 11b and 13, on the ground of irrelevancy. However, in order that the whole picture may be shown, we include them in our findings. We shall briefly summarize the salient facts.

The defendant was incorporated in the State of New Jersey and has its principal office in New York. It duly registered to do business in Pennsylvania and was engaged, during the tax year in question, in the manufacture and sale of bakery products in this State. It filed its franchise tax report for said year on which the tax was settled as aforesaid. In computing the tax, the value of the defendant's capital stock was fixed at $160,000,000.00, which excluded investments in stock of subsidiaries operating in foreign countries. There is no controversy as to this. Otherwise, the statutory formula was applied resulting in a taxable value of $11,664,320.00. Applying the 5 mills rate to this produced the tax of $58,321.60, all of which has been paid.

CONTENTION OF THE PARTIES

The defendant takes the position that the Supreme Court of Pennsylvania has declared the franchise tax imposed on foreign corporations doing business in Pennsylvania to be a property tax; that consequently, in making the tax computation, you must exclude United States securities and extra-territorial tangible and intangible assets. To do so, would reduce the tax to $27,373.36.

The Commonwealth, on the contrary, relies upon certain Supreme Court opinions which have held that the franchise tax is a tax for the privilege of doing business in Pennsylvania and is not per se a tax on corporate assets. Hence, it argues, the United States securities and extra-territorial assets must be included in the computation, save in those cases where it would bring about an unconstitutional result.

DISCUSSION

The statute with which we are here dealing is the Act of 1935, P. L. 184, which amended the Act of 1889 P. L. 420; 72 P. S. 1871. By this Act a tax was imposed on foreign corporations doing business in Pennsylvania. Section 20 of the Act requires such corporations to file reports. Section 21 imposes the tax, which the Act calls a "franchise" tax; 72 P. S. 1871(b). The tax base is determined by multiplying one-third of the capital stock valuation by three allocation fractions usually called the tangible property fraction, the wages and salary fraction, and the gross receipts fraction. This was the method used in the present case in computing the tax.

The Supreme Court has considered this Act a number of times. In Com. v. Columbia Gas & Electric Corp., 336 Pa. 209, the constitutionality of the act gen-

erally was upheld. In the course of its opinion the Court said:

"... the tax is a franchise tax and not a property tax." p. 217.

... "the incidence of the tax is fixed upon the value of the franchise; not upon the property itself;" p. 219.

The Act is designed to determine the value of "the franchise or right to do business in this State ..."; p. 219.

In Com. v. Ford Motor Co., 350 Pa. 236, the Court said:

"This Act imposes a *franchise* or *excise* tax upon foreign corporations, as distinguished from a property or ad valorem tax"; p. 240.

"In the *Columbia Gas and Electric Corp.* case supra, we held that the tax, not being a property tax, but a tax upon the privilege of engaging in business in this Commonwealth, should be measured by a valuation, etc. ..." p. 241.

In Com. v. Quaker Oats Co., 350 Pa. 253, the Court said:

"... the tax is imposed upon the privilege of doing business here, measured by capital stock"; p. 260.

In Com. v. Monessen Amusement Co., 352 Pa. 120, the Court stated:

"Appellee's contention in the present case and the decision of the court below are both rested on the false assumption that the franchise tax, in some way, is a tax on the *property* of the corporation which is used as a measure of the tax"; p. 122.

"As we stated in Commonwealth v. *Ford Motor Company*, supra, the franchise tax is not a tax upon the property of the corporation, but upon the doing of business in this Commonwealth"; p. 123.

In Com. v. American Gas Co., 352 Pa. 113, it is stated:

"The former capital stock tax upon foreign corporations was a *property* tax which could only be imposed upon corporations having property subject to the jurisdiction of the taxing authorities. The franchise tax, however, is a tax on the privilege of doing business and is an *excise* tax, as we have pointed out in numerous cases"; p. 117.

These opinions were handed down in the years 1939, 1944, 1944, 1945, 1945 respectively. They were followed in 1948, 1950 and 1953 by three cases on which the appellant relies. The first of these is Federal Drug Co. v. Pittsburgh, 358 Pa. 454. This involved the Pittsburgh mercantile license tax passed pursuant to the Act of 1947, P. L. 1145, sometimes known as the "Tax Anything Act". The Supreme Court said:

"In the second place, while in each case the object of the tax is to license for the purpose of doing business, the tax actually imposed by the Foreign Corporate Franchise Tax is *measured* by the *value* of the property of the foreign corporation within the state. In the Pittsburgh ordinance the tax is on the gross volume of business conducted by the taxpayer. The respective impacts of the two taxes are on a totally different basis;" p. 457. (Underscoring ours.)

It will be noted that the Supreme Court did not say here that the franchise tax was on the *property* of the corporation, but that it was *measured* by the *value* of the property within the state.

The second case is Murray v. Philadelphia, 364 Pa. 157. Here another ordinance was under attack. The Court said that the Sterling Act was designed to prevent the City from taxing the same thing taxed by the State and thus avoid double taxation (p. 165). It added:

> "In determining whether double taxation results, whether the city tax conflicts with that imposed by the State, the practical operation of the two taxes is controlling as against mere difference in terminology from time to time employed in describing taxes in various cases" (p. 165).

And on page 170, the Court said that the franchise tax "was obviously devised to reach the property of foreign corporations as the equivalent of the capital stock tax."

The third case is National Biscuit Co. v. Philadelphia, 374 Pa. 604, to which the present appellant was a party. There the plaintiff resisted paying a tax under a city ordinance. The real basis of the complaint was that the ordinance imposed a tax on the same base as the state franchise tax, contrary to the provisions of the Sterling Act, 1932 P. L. 45. The Supreme Court sustained the Ordinance, and, inter alia, stated:

> ". . . as to the payments made to the Commonwealth of capital stock taxes, corporate net income taxes, foreign corporation franchise taxes, and taxes on net earnings or income, it need merely be pointed out that all those taxes have been held, many times, to be property taxes"; p. 612.

Relying upon these three cases, the appellant argues that if the franchise tax is a *property* tax, we must exclude from the tax computation all United States securities and extra-territorial tangible and intangible assets, as would be done in a capital stock tax settlement. We cannot believe that the Supreme Court intended any such result. To do so might seriously impair the general tax structure of the Commonwealth.

The latter three cases mentioned above did not expressly overrule the first five referred to. The latter three were not contests between the State and its taxpayers. Interpretation and application of the franchise tax act were not directly involved. We know of no case in which the Supreme Court has deviated from its declaration that the franchise tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania. Nor do we know of any case in which it has not approved of the statutory formula in computing the tax, except when such application would bring about an unconstitutional result. Finally, we know of no case in which a foreign corporation has been allowed to deduct United States securities and extra-territorial tangible and intangible assets, in making the tax computation. They have heretofore been included in order to arrive at the fair value of the privilege enjoyed. But they have not, to our knowledge, been taxed directly. They have been included in the formula to arrive at a valuation which becomes the tax base. No matter what terminology has been employed as to the nature of the tax, or what adjectives have been used to describe it, the reported cases between the Commonwalth and its taxpayers, in which the statute is applied, have consistently held as we have indicated. It is our conclusion, therefore, that the tax settlement in the present case was correct.

CONCLUSIONS OF LAW

1. The foreign corporation tax, no matter by what name called, is a tax for the privilege of doing business in this State.

2. The Federal securities and extra-territorial tangible and intangible assets of the appellant were properly included in the tax computation.

3. The Act imposing a franchise tax on foreign corporations for the privilege of doing business in Pennsylvania, does not tax United States securities or extraterritorial tangible and intangible assets.

4. The tax in the present instance was properly settled in the amount of $58,321.60.

5. The tax has been paid.

6. The appeal should be dismissed.

## IX.
## JUDGMENT NISI.

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### ORDER.

AND NOW, to wit: April 12, 1956, the appeal is dismissed and judgment shall be entered in favor of the Commonwealth and against the defendant in the amount of $58,321.60, which judgment shall be marked satisfied upon payment of the costs, unless exceptions hereto be filed within thirty days hereof. The Prothonotary shall notify the parties or their counsel of this decree forthwith.

/s/ KARL E. RICHARDS,
*President Judge Orphans' Court.*

## X.

## DEFENDANT'S EXCEPTIONS.

AND Now, this 27th day of April, 1956, National Biscuit Company, defendant in the above entitled case, files the following Exceptions to the Findings of Fact, Conclusions of Law, Opinion and Judgment Nisi of the Court entered on April 12, 1956, and to the failure or refusal of the Trial Judge to affirm Defendant's requests for findings of fact and conclusions of law, the specific exceptions being as follows:

1. The Learned Trial Judge, by apparently failing to adopt, as findings of fact, paragraph 11(b) of the Stipulation of Facts, *as amended*, and by not adopting paragraph 18 of the Stipulation of Facts *as amended*, erred in his Opinion in making the following finding and determination of the amount of tax due under defendant's theory:

> "To do so, would reduce the tax to $27,373.30."

2. The learned Trial Judge erred in making the following finding and determination in his Opinion:

> "The third case is National Biscuit Co. v. Philadelphia, 374 Pa. 604, to which the present appellant was a party. There the plaintiff resisted paying a tax under a city ordinance. The real basis of the complaint was that the ordinance imposed a tax on the same base as the state franchise tax, contrary to the provisions of the Sterling Act, 1932 P. L. 45."

3. The learned Trial Judge erred in making the following finding and determination in his Opinion.

"Relying upon these three cases, the appellant argues that if the franchise tax is a *property tax*, we must exclude from the tax computation all United States securities and extra-territorial tangible and intangible assets, as would be done in a capital stock tax settlement. We cannot believe that the Supreme Court intended any such result. To do so might seriously impair the general tax structure of the Commonwealth."

4. The learned Trial Judge erred in making the following finding and determination in his Opinion:

"We know of no case in which the Supreme Court has deviated from its declaration that the franchise tax is a tax on foreign corporations for the privilege of doing business in Pennsylvania."

5. The learned Trial Judge erred in making the following finding and determination in his Opinion:

"No matter what terminology has been employed as to the nature of the tax, or what adjectives have been used to describe it, the reported cases between the Commonwealth and its taxpayers, in which the statute is applied, have consistently held as we have indicated. It is our conclusion, therefore, that the tax settlement in the present case was correct."

6. The learned Trial Judge erred in his First Conclusion of Law, which reads as follows:

"1. The Foreign corporation tax, no matter by what name called, is a tax for the privilege of doing business in this State."

7. The learned Trial Judge erred in his Second Conclusion of Law, which reads as follows:

"2. The Federal securities and extra-territorial tangible and intangible assets of the appellant were properly included in the tax computation."

8. The learned Trial Judge erred in his Third Conclusion of Law, which reads as follows:

"3. The Act imposing a franchise tax on foreign corporations for the privilege of doing business in Pennsylvania, does not tax United States securities or extra-territorial tangible and intangible assets."

9. The learned Trial Judge erred in his Fourth Conclusion of Law, which reads as follows:

"4. The tax in the present instance was properly settled in the amount of $58,321.60."

10. The learned Trial Judge erred in his Sixth Conclusion of Law, which reads as follows:

"6. The appeal should be dismissed."

11. The learned Trial Judge erred in failing or refusing to adopt defendant's request for findings of fact No. 11(b) (based on paragraph 11(b) of the Stipulation of Facts, *as amended*), which request was as follows:

"(b) If the taxable value were determined by applying the ratio of defendant's average tangible property in Pennsylvania over its total assets less its investment in stocks of foreign subsidiaries times its capital stock valuation $\left(\frac{6,670,235}{194,941,349 - 8,823,465} \times \$160,000,000\right)$, the resulting taxable value would be $5,734,202, which times the tax rate of five mills produces tax of $28,671.01. It is agreed that the method used in

settling capital stock tax against defendant and other foreign corporations under Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, prior to the amendments thereto by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, was the ratio of average tangible property in Pennsylvania over *total* assets times the *entire* capital stock value. The difference between this formula and that set forth above as applicable to defendant under the property tax theory for the year 1952 is caused by the fact, as disclosed in paragraph 12 of the Stipulation of Facts, that defendant's investments in stocks of subsidiaries and the income derived therefrom were excluded in the appraisal of its capital stock at $160,000,000, it being the intention of the parties hereto that said exclusion of stocks of subsidiaries and the income therefrom in said appraisal is not at issue for the purposes of this case."

12. The learned Trial Judge erred in failing or refusing to affirm defendant's Eighteenth request for findings of fact, which request was as follows:

"18. It is further stipulated and agreed by and between counsel for the Commonwealth of Pennsylvania and counsel for National Biscuit Company, defendant, that the entire record in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in this case is the same as the defendant in the present proceeding) shall be incorporated in the record of the present proceeding by reference as evidence of the facts and issues in that proceeding, without the necessity of copying the

same in the transcript of the record in the present proceeding; and that any part or parts thereof may be quoted in the argument and briefs by either party hereto at any stage, including any appellate stage, of this proceeding, as though fully appearing in the record in the present proceeding, subject to the right of the adverse parties to object to the relevancy or materiality thereof. For the purposes of this paragraph, it is further agreed that the said record shall include, but not be limited to, Appellants' printed Record (Nos. 214, 215 and 216 January Term, 1953), Appellees' printed Supplemental Record (Nos. 214, 215 and 216 January Term, 1953), the Philadelphia Ordinance and the Sterling Act (Act of August 5, 1932, Special Session 1932, P. L. 45) there involved, Appellee's Petition for Reargument (No. 214 January Term, 1953), the opinions of the several justices of the Supreme Court of Pennsylvania, and also, Appellants' Brief and Supplemental Brief (Nos. 214, 215 and 216 January Term, 1953), and Appellees' Brief and Reply Brief (Nos. 214, 215 and 216 January Term, 1953). (Stipulation of Facts, paragraph 19)"

13. The learned Trial Judge erred in failing or refusing to affirm defendant's Nineteenth request for findings of fact, which request was as follows:

"19. The parties hereto further agree that the court, in considering the issues raised in the present proceeding, may examine the printed Briefs and Records and statutes or ordinances in any case decided by the courts of this Commonwealth involving the nature of the Franchise Tax imposed by the Act of 1935 and Amendments and of the Capital Stock Tax previously imposed on

foreign corporations. (Stipulation of Facts, paragraph 19)"

14. The learned Trial Judge erred in failing or refusing to affirm defendant's Twentieth request for findings of fact, which request was as follows:

"20. On December 9, 1952 the City of Philadelphia enacted an ordinance imposing an annual mercantile license tax for the year 1953 and annually thereafter upon, inter alia, every manufacturing corporation desiring to engage in or to continue to engage in business in Philadelphia, at the rate of three mills on each dollar of the annual gross volume of business, as defined in the ordinance, transacted by such corporation (or in the alternative at the optional rate of two percent of the annual gross volume of business transacted by such company less the cost of goods and less the cost of labor), and required every such company to procure a mercantile license and pay a license fee of $3.00 for each place of business in the city. (Defendant's Exhibit No. 1; Ordinance (§§ 2, 3))"

15. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-first request for findings of fact, which request was as follows:

"21. Said ordinance was enacted under the purported authority of an enabling act known as the 'Sterling Act' which gave the city authority to levy taxes on persons, transactions, occupations, privileges, subjects and personal property, within the limits of the city, except that city council shall not have authority to levy any tax on a privilege, transaction, subject, or occupation, or on personal property 'which is now or may hereafter become subject to a State tax or license fee'. (Act of August 5, 1932, Ex. Sess., P. L. 45, 53 P. S. 4613;

*National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610)"

16. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-second request for findings of fact, which request was as follows:

> 22. The defendant, National Biscuit Company, which was then and still is doing business in Philadelphia, filed a complaint in equity, in the Common Pleas Court of Philadelphia County, to enjoin the City of Philadelphia from levying the said tax upon the Company for the reason, among others, that the Company was subject to and required to pay to the Commonwealth of Pennsylvania for the privilege of doing business therein, a franchise tax under §§ 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended, 72 P. S. 1871-1901, and that consequently the city's mercantile license fee and tax levy, as applied to National Biscuit Company, was not authorized by the Sterling Act but, on the contrary, was prohibited by such statute because, inter alia, complainant was subject to and paid the State Franchise Tax above mentioned. (Defendant's Exhibit No. 1—Record 6(a), 8(a), *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 610-611)"

17. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-third request for findings of fact, which request was as follows:

> "23. In its briefs and arguments before the Supreme Court of Pennsylvania, National Biscuit Company strenuously argued that, being already subject to a State excise tax for the privilege of doing business known as the Foreign Franchise Tax, it could not, under the Sterling Act, be again subjected to an excise tax for the privilege of

doing business by the City of Philadelphia. (Defendant's Exhibit No. 1—Brief for Appellees, pages 30-31; Petition for Reargument, pages 1-3, 6-7)"

18. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-fourth request for findings of fact, which request was as follows:

"24. The Supreme Court of Pennsylvania rejected the contention of National Biscuit Company on the ground that while the Philadelphia mercantile license tax is an excise tax, the State Franchise Tax on foreign corporations is in reality a property tax on the property of the corporation. (*National Biscuit Co. v. Philadelphia*, 374 Pa. 605, 612-614)"

19. The learned Trial Judge erred in failing or refusing to affirm defendant's Twenty-eighth request for findings of fact, which request was as follows:

"28. If the settlement in controversy should be corrected only to the extent of excluding, from the computation, defendant's investment in U. S. securities, the tax should be resettled in the amount of $50,080.27 computed as follows: $26,300,000 (total U. S. securities) over $186,117,884 (total assets less foreign subsidiaries) times $160,000,000 equals $22,609,331 (exempt capital stock value of U. S. securities). Subtracting the last figure from $160,000,000 (value of capital stock per settlement) results in adjusted capital stock value of $137,390,669, to which should be applied the composite allocation fraction or percentage shown in the settlement of .072902, thus producing a taxable value of $10,016,054.55 and applying thereto the tax rate of five mills.

results in a tax of $50,080.27, and a reduction in tax of $8,241.33, attributable to the exemption for investments in U. S. securities."

20. The learned Trial Judge erred in failing or refusing to affirm defendant's First request for conclusions of law, which request was as follows:

"1. The tax imposed on foreign corporations by the provisions of Sections 20 and 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of May 16, 1935, P. L. 184 and further amendatory acts, the last one relevant hereto being the Act of May 29, 1951, P. L. 462, hereinafter referred to as the Act of 1935 and Amendments, is a tax on defendant's capital stock and is by its incidence a property tax."

21. The learned Trial Judge erred in failing or refusing to affirm defendant's Third request for conclusions of law, which request was as follows:

"3. All of defendant's intangible assets, including its investments in stocks of subsidiary companies and in United States securities, are beyond the power and jurisdiction of Pennsylvania to levy a property tax thereon."

22. The learned Trial Judge erred in failing or refusing to affirm defendant's Fourth request for conclusions of law, which request was as follows:

"4. The statutory allocation fractions of tangible property, wages and gross receipts as provided for in the Act of 1935 and Amendments, when applied to defendant's entire capital stock value, do not determine the value of its property located in Pennsylvania. See *Com. v. Columbia Gas and Electric Corporation,* 336 Pa. 209, 221."

23. The learned Trial Judge erred in failing or refusing to affirm defendant's Fifth request for conclusions of law, which request was as follows:

> "5. The 'Francise Tax' settlement made against defendant for the year 1952 and the Act of 1935 and Amendments, if authorizing the said settlement, violate the due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that property tax is imposed therein on defendant's intangible and tangible property or assets located or having a situs outside of the Commonwealth of Pennsylvania."

24. The learned Trial Judge erred in failing or refusing to affirm defendant's Sixth request for conclusions of law, which request was as follows:

> "6. The 'Franchise Tax' settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates the uniformity of taxation provisions of Section 1 of Article IX of the Constitution of the Commonwealth of Pennsylvania and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation, particularly of United States securities and tangible property located outside of Pennsylvania, granted to domestic corporations in tax settlements on their capital stock, are denied to defendant, a foreign corporation."

25. The learned Trial Judge erred in failing or refusing to affirm defendant's Seventh request for conclusions of law, which request was as follows:

"7. The 'Franchise Tax' settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that tax is imposed in part upon defendant's investment in United States securities."

26. The learned Trial Judge erred in failing or refusing to affirm defendant's Eighth request for conclusions of law, which request was as follows:

"8. The tax imposed on foreign corporations, including the defendant, by the Act of 1935 and Amendments is the 'equivalent' of a property tax.

27. The learned Trial Judge erred in failing or refusing to affirm defendant's Ninth request for conclusions of law, which request was as follows:

"9. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the 'equivalent' of a property tax, the 'Franchise Tax' settled against defendant for the year 1952 violates Article VI, Clause 2 and Article I, Section 8, Clause 2, of the Constitution of the United States, in that the incidence of the tax is in part upon defendant's investment in United States securities."

28. The learned Trial Judge erred in failing or refusing to affirm defendant's Tenth request for conclusions of law, which request was as follows:

"10. The 'Franchise Tax' settled against defendant for the year 1952, wherein tax is imposed on its property and assets, violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C. Section 742, which generally exempts interest-bearing obligations of the United States from state and local taxation."

29. The learned Trial Judge erred in failing or refusing to affirm defendant's Eleventh request for conclusions of law, which request was as follows:

"11. For the additional reason that the tax imposed by the Act of 1935 and Amendments is the 'equivalent' of a property tax, the 'Franchise Tax' settled against defendant for the year 1952 violates Section 3701 of the Revised Statutes of the United States, 31 U. S. C., Section 742, which generally exempts interest-bearing obligations of the United States from state and local taxation, in that the incidence of the tax is in part upon defendant's investment in United States securities."

30. The learned Trial Judge erred in failing or refusing to affirm defendant's Twelfth request for conclusions of law, which request was as follows:

"12. To sustain the Act of 1935 and Amendments and the tax settlement made against defendant thereunder for the year 1952 as imposing a franchise or excise tax on defendant for the privilege of doing business in Pennsylvania and not a property tax, would be inconsistent with the decision of the Supreme Court of Pennsylvania in the case of *National Biscuit Company v. Philadelphia*, 374 Pa. 604 (National Biscuit Company, one of the appellees in that case is the same as the defendant in the present proceeding) and with similar prior decisions of that Court, and would, in such event and under such circumstances, violate the Pennsylvania and Federal Constitutions as follows:

(a) The due process and property clauses of Sections 1, 9 and 10 of Article I of the Constitution of Pennsylvania and of Section 1 of the Fourteenth

Amendment to the Constitution of the United States, in that such decision would be inconsistent with the above mentioned prior decision rendered against the defendant, would be arbitrary and unreasonable, and would deny defendant a reasonable adjudication of its rights.

(b) The uniformity clause of Section 1 of Article IX of the Constitution of Pennsylvania and the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that exemptions and exclusions from taxation granted to domestic corporations in tax settlements on their capital stock would be denied to defendant, a foreign corporation, on the basis of semantics and of distinctions having no substance or reality."

31. The learned Trial Judge erred in failing or refusing to affirm defendant's Thirteenth request for conclusions of law, which request was as follows:

"13. Defendant's tax liability for the year 1952 under the Act of 1935 and Amendments, should be determined by eliminating in the tax computation any tax liability on defendant's tangible property located outside of Pennsylvania, its investments in United States securities and its other intangible assets."

32. The learned Trial Judge erred in failing or refusing to affirm defendant's Fourteenth request for conclusions of law, which request was as follows:

"14. Judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Twenty-eight Thousand Six Hundred Seventy-one Dollars and one cent ($28,671.01), computed as set forth in defendant's

Request for Findings of Fact No. 26, which, having been overpaid, should be marked satisfied, and said judgment should order a credit of Twenty-nine Thousand Six Hundred Fifty Dollars and Fifty-nine cents ($29,650.59) to be entered in favor of defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General."

33. The learned Trial Judge erred in failing or refusing to affirm defendant's Fifteenth request for conclusions of law, which request was as follows:

"15. If the tax settlement should be corrected only to the extent of excluding from the computation, defendant's investment in United States securities, judgment should be entered in favor of the Commonwealth and against the defendant in the amount of Fifty Thousand Eighty Dollars and Twenty-seven cents ($50,080.27), computed as set forth in defendant's Request for Finding of Fact No. 28, which, having been paid, should be marked satisfied, and said judgment should order a credit of Eight Thousand Two Hundred Forty-one Dollars and Thirty-three cents ($8,241.33) to be entered in favor of the defendant on the proper books and records of the Department of Revenue and the Department of the Auditor General."

34. The learned Trial Judge erred in failing or refusing to affirm defendant's Sixteenth request for conclusions of law, which request was as follows:

"16. The Board of Finance and Revenue erred in making the following decision:

'And now, to wit, March 17, 1954.

'This petition for review is refused and the action taken by the Department of Reve-

nue, approved by the Department of the Auditor General, is hereby sustained.' "

35. The learned Trial Judge erred in failing or refusing to affirm defendant's Seventeenth request for conclusions of law, which request was as follows:

"17. The appeal is sustained at the cost of the Commonwealth."

36. The learned Trial judge erred in entering the following judgment nisi:

"ORDER

AND Now, to-wit: April 12, 1956, the appeal is dismissed and judgment shall be entered in favor of the Commonwealth and against the defendant in the amount of $58,321.60, which judgment shall be marked satisfied upon payment of the costs, unless exceptions hereto be filed within thirty days hereof. The Prothonotary shall notify the parties or their counsel of this decree forthwith.

/s/ KARL E. RICHARDS,
*President Judge Orphans' Court.*"

Respectfully submitted,

/s/ LESLIE M. SWOPE,
Leslie M. Swope,
DRINKER BIDDLE & REATH,
117 S. 17th Street,
Philadelphia 3, Pa.,

/s/ ROY J. KEEFER,
Roy J. Keefer,
HULL, LEIBY & METZGER,
208 Walnut Street,
Harrisburg, Pa.,
*Attorneys for Defendant.*

## XI.

## OPINION ON EXCEPTIONS.

By THE COURT:

The defendant has filed thirty-six exceptions to "the findings of fact, conclusions of law, opinion and judgment nisi of the court entered on April 12, 1956, and to the failure or refusal of the court to affirm defendant's requests for findings of fact and conclusions of law".

The first exception relates to our statement that to sustain the contention of the defendant "would reduce the tax to $27,373.30". This figure we correct to $28,671.01, in accordance with the amendment to the stipulation.

All of the other exceptions relate to questions which were fully argued originally and considered by the court. No good purpose would be served by discussing them. They may be reviewed on appeal.

Therefore, we affirm that the tax in question, so far as this case is concerned, is a franchise or excise tax for the privilege of doing business, and is not, for the present purposes, a property tax. We have corrected the figure complained of in Exception No. 1. Each and all of the other exceptions are dismissed.

## XII.
## FINAL JUDGMENT.

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### FINAL ORDER.

AND Now, to-wit: November 9, 1956 judgment is directed to be entered in accordance with our decree nisi.

/s/ KARL E. RICHARDS,
*President Judge Orphans' Court.*

## XIII.

## STATEMENT SERVED ON LOWER COURT UNDER RULE 43.

To Honorable Karl E. Richards:

Pursuant to Rule 43, printed above, you are hereby notified that on Nov. 29, 1956 an appeal was taken to the Supreme Court of Pennsylvania in the above entitled case at No. 25 May Term, 1957 by National Biscuit Company, and that appellant complains of the following matters, the reasons for which do not appear of record:

### Statement of Matters Complained of

In its judgment nisi and final judgment in favor of the Commonwealth, and accompanying opinions, the lower court ruled that the so-called Pennsylvania Foreign Franchise Tax is an excise tax for the privilege of doing business in Pennsylvania, and consequently, that the measure of the tax is not limited to property having a situs in Pennsylvania; thereby deciding one of the issues raised by appellant in that court.

The appellant also contended in the lower court, both in its pleadings and in its written and oral arguments, (1) that even though the tax involved be deemed to be an excise tax for the privilege of doing business in Pennsylvania, under certain decisions of the Supreme Court of Pennsylvania, such decisions do not overrule or nullify other, and some more recent, decisions of the Supreme Court of Pennsylvania, which also hold that the said tax is a property tax or the equivalent of a property tax, and therefore, that the United States securities owned by appellant must at

least be excluded from the tax base in computing the tax, and (2) that a judicial determination in support of the Commonwealth in this case upon a theory of the tax which is inconsistent with that used by the Supreme Court of Pennsylvania in *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 98 Atl. 2d 182 (1953), involving the same taxpayer, which inconsistency necessarily results from the decision of the lower court appealed from in this case, constitutes an arbitrary and unconstitutional abuse of judicial power.

The lower court failed to discuss the two points last mentioned in its opinions accompanying the judgment nisi and the final judgment; and accordingly, the reasons for the court's judgment with respect thereto, do not appear of record.

These matters will constitute two of the principal issues raised by appellant on its appeal to the Supreme Court.

/s/ Roy J. Keefer,
*Attorney for Appellant.*

Nov. 29, 1956, Service of the foregoing notice is hereby accepted.

/s/ Karl E. Richards,
*P. J. Orphans' Court.*

## XIV.

## STIPULATION CONCERNING THE RECORD.

And Now, March 1, 1957, Counsel for National Biscuit Company, appellant, and Counsel for the Commonwealth of Pennsylvania, appellee, agree that, except for the Statement of general issues involved to be filed by Counsel for Appellee with the lower court, the foregoing shall constitute the entire printed Record in this case on appeal to the Supreme Court of Pennsylvania, entered at No. 25 May Term, 1957.

/s/ GEORGE W. KEITEL,
*Counsel for Appellee.*

/s/ ROY J. KEEFER,
*Counsel for Appellant.*